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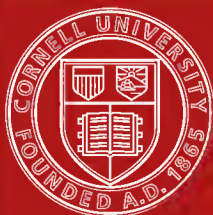
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THE LAW OF CONTRACTS.

THE LAW
OF
C O N T R A C T S

BY
JOHN WILLIAM SMITH, ESQ.,

AUTHOR OF "LEADING CASES," "LAW OF LANDLORD AND TENANT," ETC.

Fourth American,
FROM THE SECOND LONDON EDITION.

BY
JOHN GEORGE MALCOLM, ESQ.,

WITH
NOTES AND REFERENCES TO BOTH ENGLISH AND AMERICAN
DECISIONS,

BY WILLIAM HENRY RAWLE,

AND WITH
ADDITIONAL NOTES AND REFERENCES TO
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BY THE HON. GEORGE SHARSWOOD.

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ADVERTISEMENT

TO THE FOURTH AMERICAN EDITION.

THE present has been printed from the last English edition, in which the substance of the English notes to the former editions has been incorporated with the text. Much new matter, comprising the most recent statutes and the latest decided cases, has been added. The full and able notes of the former American editor have been retained; the work of the present editor having been to re-arrange these notes, so as to accommodate them to the altered arrangement of the work, and to add some few notes and references to later American cases.

G. S.

P R E F A C E.

THIS Second Edition of Smith's Lectures on the Law of Contracts contains the text of Mr. Smith, as published in the First Edition, with such alterations and additions as the changes in the law seemed to the Editor to require. These, as also such notes of the former Editor as have been retained, are distinguished from the text of Mr. Smith by being inclosed between brackets. Amongst them are, in many instances, included short accounts of the cases quoted by Mr. Smith,—additions which seemed necessary, in order to supply examples of the rules enunciated, and in order to make the Lectures as printed resemble those which were originally delivered by the Author. It was thought desirable, for facility of reading, to introduce these additions into the text.

J. G. M.

LAMB BUILDING, May, 1855.

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W.			
3 Will. 3, c. 14,	23		

THE LAW OF CONTRACTS.

LECTURE I.

ON THE NATURE AND CLASSIFICATION OF CONTRACTS, AND ON CONTRACTS BY DEED.

THE whole practice of our English Courts of Common Law, if we except their criminal jurisdiction and their administration of the law of real property, of which it is not my intention to speak, to which may possibly be added those cases which fall within the fiscal jurisdiction peculiar to the Court of Exchequer, if we except these, the whole of the remaining subjects with which the jurisdiction of a Court of Common Law is conversant may be distributed into two classes, *Contracts* and *Torts*. Of this you can easily satisfy yourselves by putting to your own minds any conceivable case of legal inquiry. If it do not involve a question of criminal law, or of the title to land, or of Exchequer jurisdiction, you will find that it resolves itself into a **contract* or a *tort*. Thus, suppose it [*2] to be the non-performance of a covenant, the non-payment of a bond, the dishonor of a bill of exchange, the non-payment of rent, the default of a surety,—these are all subjects of inquiry arising from contracts. So, again, if it involve an assault on the person, an injury

to reputation by libel or slander, a nuisance to the dwelling or the premises, a conversion of property,—these are only so many descriptions of torts. And as the subjects of legal inquiry divide themselves, so do the forms in which the inquiry is carried on; for all actions, as you are aware, are of TORT or of CONTRACT, a division which, as you see, is rendered necessary by the very nature of things, and does not result from any arbitrary principle of arrangement.

Now, therefore, the whole subject-matter of the inquiries about which our Courts of Law are conversant (excepting the cases I have excepted) being distributable into these two heads, *Contract* and *Tort*, I am about to take the former of them, that of *contract*, and state to you those principles of every-day recurrence which govern the law of England relative to contracts, and which it is absolutely necessary that every lawyer should bear constantly in mind, and have (to use the ordinary expression) at his fingers' ends, if he will avoid falling into egregious mistakes in the course of his daily practice.

[*3] *All contracts are divided by the Common Law of England into three classes:—

1. CONTRACTS BY MATTER OF RECORD.
2. CONTRACTS UNDER SEAL.
3. CONTRACTS NOT UNDER SEAL, or SIMPLE CONTRACTS.

With regard to contracts by matter of record, they are so little used in the ordinary affairs of private individuals, that I may dismiss them in a very few words. At an early period of our law, statutes merchant and statutes staple, which are both contracts of record for the payment of debts, were commonly in use. [Subsequently, recognizances in the nature of a statute

staple were established.(a)] These contracts are, however, now almost unheard of. The only contract of record with which we now occasionally meet is a recognizance, and that oftener in matters in which the Crown is concerned than between subject and subject.¹

(a) 13 Ed. 1, stat. 3, c. 1; 27 Ed. 3, c. 9; 23 Hen. 8, c. 6; 8 Geo. 1, c. 25.

¹ A statute provision requiring a deed or contract to be recorded for safe keeping, and notice to purchasers, does not thereby make it a record, in the technical sense of that term. And it has been so held even in cases in which the legislature have directed the process upon such deed or contract to be by *scire facias*, a writ which at common law lies on a record only. Thus, in Pennsylvania, it has been decided that *nul tiel record* is no plea to a *scire facias* on a mortgage: *Frear v. Drinker*, 8 Barr, 520; so also that the registry of a mechanic's lien is no record, and to a *scire facias* upon it, the plea of *nul tiel record* is a nullity. *Davis v. Church*, 1 Watts & Serg. 240.

A recognizance is a debt of record, entered into before some court, judge, or magistrate, having authority to take the same. *Com. v. Emery*, 2 Binney, 431; *Page v. Mississippi*, 25 Mississippi, 54. If the recognizance does not show that the court or judge had jurisdiction of the subject-matter, it is void. *Bridge v. Ford*, 4 Mass. 641, 7 Mass. 209; *Commonwealth v. Bolton*, 1 Serg. & Rawle, 328. It need not be under the seal of the party: *State v. Root*, 2 Rep. Const. Ct. 123; *Hall v. State*, 9 Alabama, 827; nor signed. A certificate that it was acknowledged on the day of its date is sufficient. *Madison v. Commonwealth*, 2 A. K. Marshall, 131; *Commonwealth v. Mason*, 3 Ibid. 456. It cannot be aided by parol averments. If made returnable at a time when no term of court is holden, and there is nothing in the record from which the court can infer that such time was intended to describe the time of the next session of the court, the recognizance is void. *Treasurer v. Merrill*, 14 Vermont, 64; *The State v. Crippen*, 1 Ohio State Rep. 399. See *Commonwealth v. Bolton*, 1 Serg. & Rawle, 328.

A paper purporting to be a recognizance, but taken by one not authorized, although not technically a recognizance, is good as a bond at common law. *Dennard v. State*, 2 Kelly, 137; *Contra*, *Sargeant v. State*, 16 Ohio, 267.

The mere fact that proceedings are erroneous, will not avoid a recognizance given in the course of them. *Commonwealth v. Huffey*,

Thus the ordinary mode of compelling a witness to attend and prosecute or give evidence in a criminal case is by *recognizance*, in which he binds himself to the Queen in a certain sum conditioned for the performance of the duty imposed on him; and in case of his making default, that sum accordingly becomes forfeited, and payable to her Majesty. The *commonest case of a recognizance between subject and subject was that of bail; which has, however, become much less frequent since the Act (b) restraining the right to arrest on mesne process. [Statutes and recognizances obtained or entered into in the name or upon account of her Majesty, do not affect lands as to purchasers, unless registered under stat. 2 & 3 Vict. c. 11.]

The peculiar incidents of a contract of record are, first, that, like all records, they prove themselves, their bare production without any further proof being sufficient evidence of their existence, should it be controverted.

Secondly, that, if it become necessary to enforce them, that may be done, if it be thought proper, by writ of *scire facias*,—a writ which lies on a record only, and consequently cannot be made use of for the

(b) 1 & 2 Vict. c. 110.

6 Barr, 348. A recognizance need not recite the special facts which gave the officer an authority to act in the particular case in which it was taken. It is enough, if he had jurisdiction in cases of that general description; and it appears that the condition is to do something to which a party may legally be bound by recognizance. *People v. Kane*, 4 Denio, 530; *The People v. Millis*, 5 Barbour Sup. Ct. 511; *Gildersleeve v. The People*, 10 Barbour Sup. Ct. 35.

The record is not the forfeiture of a recognizance, but only evidence of it; and neglect of the clerk to omit to record the forfeiture when it is decreed, cannot affect it. It may be entered *nunc pro tunc*, and the record, when so amended, is conclusive in a collateral proceeding. *Rhoads v. The Commonwealth*, 15 Penna. State Rep. 272.

purpose of enforcing any other description of contract.(c)

[An obligation by record may be discharged by a release, an instrument which is always under seal.(d)]

However, as I said, the other two classes of contracts are those which are of most practical importance, and to which, therefore, my observations will be addressed. These, as I have said, are—

*1. CONTRACTS BY DEED.

2. CONTRACTS WITHOUT DEED, or SIMPLE CONTRACTS. [*5]

1. With regard to contracts by deed :

A Deed is a written instrument, sealed and delivered.(e)

Let us pause for a few moments to consider the parts of this definition.

In the first place, it is a written instrument, and this writing, the old books say, must be on paper or parchment; for if it were written on linen, wood, or other substance, it would not be a deed.(f) But, though every deed must be written,(g) it is not necessary that every such instrument should be *signed*, for, at Common Law, signature was not an essential ceremony;(h) and, although now by several statutes, particularly the Statute of Frauds,(i) of which I shall have presently a good deal more to say, *signature* has been rendered essential to the validity of certain specified contracts, yet there are many others which are

(c) Now regulated by 15 & 16 Vict. c. 76, s. 32.

(d) *Barker v. St. Quintin*, 12 M. & W. 441; *Shepp. Touch.* 322.

(e) *Co. Litt.* 171 b; *Shepp. Touch.* 50. See *Hibblewhite v. M'Morine*, 6 M. & W. 200.*

(f) *Co. Litt.* 35 b.

(h) *Id.* 56.

(g) *Shepp. Touch.* 54.

(i) 29 Car. 2, c. 3.

not affected by any statute; and to such contracts and also to those which are the subjects of the several [*6] sections of the Statute of Frauds relating to *contracts, (*k*) if entered into by deed, signature is not essential. (*l*)¹

Secondly, it must be *sealed and delivered*. This is the main distinction between a *deed* and any other contract. The seal is an indispensable part of every deed,² and so is the *delivery*; (*m*) with regard to which you must, however, observe, that it is not absolutely necessary that the party executing should take the instrument into his hand and give it to the person for whose benefit it is intended; (*n*) thus it is said by Lord

(*k*) See Shepp. Touch. by Preston, 56; Cooch v. Goodman, 2 Q. B. 580; 42 E. C. L. R.; Aveline v. Whisson, 4 M. & Gr. 801, 43 E. C. L. R.; Cherry v. Heming, 4 Exch. 631. See 2 Bla. Comm: 305.

(*l*) Bac. Abr. Obligation, C.

(*m*) Shepp. Touch. 57.

(*n*) See Goodright v. Straphan, Cowp. 204, and Bac. Abr. Obligation, C.

¹ Maule v. Weaver, 7 Barr, 332; Jeffery v. Underwood, 1 Pike, 108. But see Armstrong v. Stovall, 26 Mississippi, 275.

² The policy of the common law as to the use and nature of a seal, was very fully discussed by Kent, C. J., in Warren v. Lynch, 5 Johns. 244, where the Court refused to recognize a scrawl or scroll made by the pen as a seal, and held that a seal must be composed of wax or some tenacious substance. By statute in that State, however (Stat. of 7 April, 1848, c. 197), the impression of the seal upon the paper is sufficient in the case of a corporation, and the statutes of Maine, Vermont, New Hampshire, and Massachusetts, give validity to such impressions in the case of legal processes and official documents. With this exception, all the New England States adhere to the common law requisitions of a seal. In New Jersey, a scroll with the pen is a sufficient seal on any instrument for the payment of money. (Rev. Stat. 1846.) By the common law of Pennsylvania, Delaware, North and South Carolina, and Mississippi, such a scroll has always been recognized as a sufficient seal, and in most, if not all the other States, it is believed that the law has been so settled by statute.—R.

Coke, in the Commentary on Littleton, (o) that *a deed may be delivered by words without actual touch, or by touch without words*. "The delivery," his Lordship says, "is sufficient without any words; for, otherwise, a man who is mute could not deliver a deed.
 . . . And, as a deed may be delivered to the party *without words*, so may a deed be delivered by *words without* any act of delivery; as, if the writing sealed lieth on the table, and the feoffor or obligor saith to the feoffee or obligee, 'Go, and take up the writing, it is sufficient for you, *or* it will serve the turn, *or* take it as my deed,' or the like words, it is *a sufficient delivery." (p) However, in practice, it is [*7]
 always safest and most advisable to follow the ordinary and regular course, which is, to cause the person who is to deliver the deed to place his finger on the seal, and acknowledge the seal to be his seal, and state that he delivers the instrument as his act and deed.¹

It is not necessary that the delivery should be to the person who is to take the benefit of the deed. The

(o) Co. Litt. 36 a.

(p) See further, *Doe d. Lloyd v. Bennett*, 8 Car. & P. 124, 34 E. C. L. R.

¹ While delivery is essential to the legality of a deed, it may be either actual or verbal; it is sufficient if there be an intention or assent of the mind on the part of the grantor to treat the deed as his. *Stewart v. Redditt*, 3 Maryland, 67; *McLure v. Colclough*, 17 Alabama, 89. The possession of the deed by a party claiming under the grantee is evidence of delivery to such grantee until the contrary is shown. *Stewart v. Redditt*, 3 Maryland, 67; *McMorris v. Crawford*, 15 Alabama, 271; *Rushin v. Shields*, 11 Georgia, 636; *Dawson v. Hall*, 2 Michigan, 390. The acknowledgment and recording of a deed are sufficient to warrant the presumption of a legal delivery, and as the clerk, after he has recorded it, is bound to return it to the grantee, the possession of it by him will be regarded as the possession of the grantee. *Stewart v. Redditt*, 3 Maryland, 67. See *Critchfield v. Critchfield*, 24 Penna. Stat. Rep. 100.

judgment in the case of *Doe d. Garnons v. Knight*, (q) which was delivered by Sir John Bayley after a *curia advisari vult*, is worthy of a most careful perusal; the learning relating to this subject will be found there ably collected and discussed. The inference the Court, of which his Lordship was the organ, there drew from all the authorities on the subject was:—

1st. “That, where an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping the deed in the hands of the executing party, nothing to show that he did not intend it to operate immediately, that is a valid and effectual deed; and that delivery to the party who is to take by it, or any other person for his use, is not [*8] essential.”

*2d. “That delivery to a third person for the use of the party in whose favor a deed is made, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery.”¹

(q) 5 B. and C. 671, 11 E. C. L. R. See *Botcherby v. Lancaster*, 1 A. & E. 77, 28 E. C. L. R.; *Doe d. Richards v. Lewis*, 20 L. J. (C. P.) 177; 11 C. B. Rep. (2 J. Scott), 1035, 73 E. C. L. R.

¹ As early as the year 1809, the case of *Belden v. Carter*, 4 Day, 66, was similarly decided in Connecticut upon much the same facts as in *Doe v. Knight*, and in 1814, twelve years before the decision of that case (which is also reported in 8 Dowl. & Ryl. 348, and see *Exton v. Scott*, 6 Simons, 21), the same conclusions had been arrived at, upon a review of nearly the same authorities, in the case of *Souverbye v. Arden*, 1 Johnson's Ch. R. 240, decided by Mr. Chancellor Kent, where the grantor of a voluntary deed having sworn in his answer to a bill filed by the grantees, “that he believed that he and his wife sealed the deed in the presence of two witnesses, and that they may have used the formal words of delivery,” it was held that neither the subsequent retention of the possession of the deed by the grantor, nor his subsequent declaration contrary to its tenor, could destroy its efficacy: *Young v. Moore*, 1 Strobbart, 55; and it is well settled that

Before quitting the subject of delivery, it is right to explain the distinction between a deed, ordinarily so

if the deed *has ever been* once actually delivered, the retention or the parting with its possession is an immaterial fact. *Scruggins v. Wood*, 15 Wendell, 545; *Jackson v. Dunlop*, 1 Johns. Cases, 114; *Brinkerhoff v. Lawrence*, 2 Sandford's Ch. 406; *Rosevelt v. Carrow*, 6 Barbour's S. C. R. 190; *Jones v. Jones*, 6 Connect. 111; *Den v. Farlee*, 1 Zabriskie, 285; *Blight v. Schenck*, 10 Barr, 285; *Farrar v. Bridges*, 5 Humphreys, 411.

But upon the question whether there *has ever been* a delivery, the possession of the instrument may have a material bearing. Delivery is, to a certain extent, a question for the jury, but under the direction of the Court; to what extent may be well exemplified by the case of *Doe v. Knight*, which was an ejectment upon a mortgage. Wynne, an attorney, who had been in his lifetime the owner of the premises in question, had received a large sum for his client Garnons, and sent word to him that he had misapplied £10,000 of it, but that he would make him secure. Some years after Wynne wrote with his own hand a mortgage of all his property to Garnons to secure £10,000, brought it into the presence of his niece, signed and sealed it, said, "I deliver this as my act and deed," and then took it away. In the same month he delivered a parcel to his sister, saying, "Take this, it belongs to Mr. Garnons." Some days after, he asked for and took away the parcel, and in a few days returned it, somewhat reduced in bulk, saying, "Here, put this by." Some months after this, Wynne died, having first executed a second mortgage of all his property to another person. The parcel was found to contain the mortgage which the niece had witnessed, which was to secure £10,000, together with a statement of the account between Garnons and himself, showing an indebtedness of that amount. The jury were told that if the delivery to the sister was, under the circumstances, a departing with the possession of the deed, and of the power and control over it for the benefit of Garnons, and to be delivered to him either in Wynne's lifetime, or after his death, they should find for the plaintiff, but that if it was merely delivered to her for safe custody as the depository, and was subject to his future control and disposition, they should find for the defendant. The jury having found for the plaintiff, Sir John Bayley, in delivering the opinion of the Court refusing a new trial, adverting to the objection that the conclusion which the jury drew, viz., that the sister held the mortgage free from the control of her brother, had no premises to support it, answered it by saying that although the

termed, and an *escrow*.(r) An escrow is a deed delivered conditionally to a third person, to be delivered

(r) Shepp. Touch. 58.

sister did return it, yet she would have been justified had she refused. (See to the same effect as to the depository being a trustee for the grantee, *Belden v. Carter*, 4 Day, 66.) Two questions, therefore, arose; first, whether when a deed is duly executed and formally delivered with appropriate words, but retained by the party executing it, that retention will obstruct the operation of the deed, which question was answered in the negative; and, secondly, whether if delivery for such party be essential, a delivery to a third person will be sufficient, if such delivery puts the instrument out of the power and control of the party who executed it, though such third person does not pass the deed to the party to be benefited until after the death of the grantor. This question was answered in the affirmative; and both of these propositions are perfectly settled law on both sides of the Atlantic. *Belden v. Carter*, 4 Day, 66; *Johnson v. Ruggles*, 13 Johns. 288; *Brown v. Brown*, 1 Woodbury & Minot, 325; *Bryan v. Wash*, 2 Gilman, 557; *Merrills v. Swift*, 18 Connect. 257; and see many cases collected in the opinion of the Court in *Hulick v. Scovil*, 4 Gilman, 159.

The grantor's placing the deed upon record—his putting it in the post-office directed to the grantee—his bringing an action for the consideration-money—the grantee's having possession of the deed—or of the premises consistently with the tenor of the deed—constitute *prima facie* evidence, upon which the jury may presume that the deed was delivered. *Porter v. Cole*, 4 Greenleaf, 25; *Ward v. Lewis*, 4 Pick. 520; *Mills v. Gore*, 20 Id. 36; *Games v. Stiles*, 14 Peters, 322; *Collins v. Bankhead*, 1 Strobhart, 25; *Houston v. Staunton*, 11 Alabama, 412; *M'Kinney v. Rhoads*, 5 Watts, 343; *Rigler v. Cloud*, 2 Harris, 364; *Blight v. Schenck*, 10 Barr, 285; *Gardner v. Collins*, 3 Mason, 401. So, where a deed was left in the hands of the magistrate before whom it was acknowledged, and was afterwards taken away by the brother of the grantee for him, this was held sufficient evidence to go to the jury, from which they might presume delivery: *Arrison v. Harmsted*, 2 Barr, 191; while, on the other hand, if the deed were put into the post-office, directed not to the grantee nor his agent, but to an agent of the grantor, it would be error to leave the question of delivery to the jury, as there would be no evidence from which delivery could be presumed. *Elsly v. Metcalf*, 1 Denio, 324; *White v. Baily*, 14 Connect. 271. So, where there were neither acts done nor words spoken from

to the person for whose benefit it purports to be, on some condition or other. If that condition be per-

which a delivery could be inferred, and the possession of the deed by the party seeking to take advantage of it was accounted for by his having taken possession of all the papers of the grantor after his death, it was held error to leave the question of delivery to the jury. *Clayton v. Liverman*, 4 Dev. & Battle, 238.

It was suggested by the English editor that the qualifications adopted in *Doe v. Knight* had been overlooked by the more recent authorities, and that the doctrine of that case has been of late more broadly laid down. But it is believed that they do not either narrow or enlarge the rules adopted in that case, being (with but one exception, *Grudgeon v. Gerrard*) cases of voluntary settlements in favor of near relatives, or the like, sought to be enforced in equity, as to which, it has been repeatedly held, that Courts will go farther in the presumption of a delivery than in ordinary cases of conveyance. *Bryan v. Walsh*, 2 Gilman, 557; *Brown v. Brown*, 1 Wood. & Min. 325; *Souverbye v. Arden, &c.* In *Fletcher v. Fletcher*, 4 Hare, 67, cited by him, a testator executed a voluntary covenant with trustees, that in case his two natural sons should survive him, his executors should pay to the trustees £60,000 for such of the sons as should be living at the time of his death. This instrument, which purported to be regularly executed, was found among the testator's papers some years after his death, and upon a bill filed by the surviving son to have the covenant enforced, the stress of the argument was laid upon the deed being voluntary, executory, and testamentary, and as such revoked by the subsequent will, and Vice-Chancellor Wigram, after answering these objections, said, "The only other question arises from the circumstances of the instrument having been kept in the possession of the party; does that affect its legal validity? In the case of *Dillon v. Coppin*, 4 Myl. & Cr. 660, I had occasion to consider that subject, and I took pains to collect the cases upon it. The case of *Doe v. Knight* shows, that if an instrument is sealed and delivered, the retainer of it by the party in his possession, does not prevent it from taking effect. No doubt the intention of the parties is often disappointed by holding them to be bound by deeds which they have kept back, but such unquestionably is the law." The cases thus referred to were *Barlow v. Heneage*, Pre. Ch. 211; *Lady Hudson's case*, Id. 235; *Clavering v. Clavering*, 2 Vernon, 473, Dom. Proc. 1 Bro. P. C. 122; *Broughton v. Broughton*, 1 Atkins, 625; *Doe v. Knight*, Sear v. Ashwell, 3 Swans. 411; *Worral v. Jacob*, 3 Merivale, 256; and *Exton*

formed, it becomes an absolute deed ; till then it continues what is called an escrow, and, if the condition never be performed, it never becomes a deed at all. (s)

(s) *Johnson v. Baker*, 4 B. & Ald. 440, 6 E. C. L. R. ; *Murray v. E. of Stair*, 2 B. & C. 82, 9 E. C. L. R.

v. Scott, 6 Simons, 31 ; the first four of which were all cited and reviewed in *Doe v. Knight*, and the language used in that case by Sir John Bayley, and quoted *supra*, was cited by Mr. Wigram at length.

In looking at the cases in equity upon this head, much will be found to turn upon the nature of the instrument, and the purpose for which it was intended. *Bryan v. Walsh*, 2 Gilman, 557 ; *Sou- verbye v. Arden*, &c. Thus, in *Ward v. Lamb*, Prec. Ch. 182, the Court refused to decree the giving up of a voluntary bond made to a daughter, to protect the obligor from taxation, and retained by him ; and in *Cecil v. Butcher*, 2 Jacob & Walker, 573, the Court refused to enforce a conveyance made (and retained) by a father in favor of a son in order to give him a qualification to kill game, and the Master of the Rolls, after viewing the authorities, said, "They have not depended solely upon the question whether the party has made a voluntary deed ; not merely upon whether having made it, he keeps it in his own possession ; not merely upon whether it is made for a particular purpose ; but when all these circumstances are connected together, when it is voluntary, when it is made for a purpose that has never been completed, and when it has never been parted with, then the courts of equity have been in the habit of considering it as an imperfect instrument." *Ward v. Ward*, 2 Haywood, 226 ; *Jackson v. Inabnit*, 2 Hill Ch. 411 ; *Kirk v. Turner et al.* 1 Devereux's Ch. 14.

The acceptance by the grantee of a deed is as essential to its validity as its delivery by the grantor. It rests, however, upon much stronger presumptions where the deed purports to confer a benefit, and an actual acceptance need not then be shown in the first instance, either by the grantee himself, or any one beneficially interested under it. *Butler and Baker's case*, 3 Coke, 26 b ; *Thompson v. Leach*, 2 Ventries, 202 ; *Hatch v. Hatch*, 9 Mass. 307 ; *Belden v. Carter*, 4 Day, 66 ; *Church v. Gilman*, 15 Wendell, 656 ; *Reed v. Marble*, 10 Paige, 409 ; *Tate v. Tate*, 1 Dev. & Bat. (Ch.), 22 ; *Halsey v. Whitney*, 4 Mason, 214. The presumption is, of course, however, liable to be rebutted, and it will be nearly, if not quite, overthrown

This conditional delivery must be to some third person ; for, if it were to the party himself who is to be

in cases where the acceptance of the deed confers no benefit, or inflicts a positive harm upon the other party. *Jackson v. Bodle*, 20 *Johnson*, 184 ; *Camp v. Camp*, 5 *Connecticut*, 300 ; *Renfro v. Harrison*, 10 *Missouri*, 411.

How far the relation back of the subsequent acceptance to the original delivery will affect the attaching of intermediate interests, is a question of some practical importance. In *Wilt v. Franklin*, 1 *Binney*, 502, the rights arising under an execution levied between the period of delivery of an assignment for creditors, and assent by the grantee—a space of four days,—were postponed to those arising under the deed. *Merrills v. Swift*, 18 *Connecticut*, 257, was very similar to *Doe v. Knight*. A debtor being in failing circumstances executed a mortgage, and delivered it to one for the use of the mortgagee. The mortgage was immediately recorded, and some time after, was assented to by the mortgagee, and it was held to be entitled to a preference over an intermediate attachment. In *Harrison v. The Trustees of Philips' Academy*, 12 *Massachusetts*, 401, where an embarrassed debtor made a conveyance to his sureties by way of precautionary indemnity, of which they were ignorant till a month afterward, when it was assented to by them, it was said by Parker, C. J., that creditors might have arrested the transaction by an execution levied in the intermediate time ; but there was a question of fraud in the case, evidence of which would, it is conceived, always invalidate such a transaction ; and the remarks on *Wilt v. Franklin* in *M'Kinney v. Rhoads*, 5 *Watts*, 345, were directed to the want of delivery in that case, apart from which, it is said, that the decision is perfectly correct. Where, moreover, a deed is delivered *as an escrow*, although, as is stated in the text, it relates back to the time of the original delivery : *Foster v. Mansfield*, 4 *Metcalf*, 412 ; *Graham v. Hughes*, 13 *Johns*. 235 ; yet it must be borne in mind that this is for certain purposes only—that this fiction is resorted to in cases of necessity, to prevent injury and uphold the deed ; as, for instance, where a feme sole delivers a deed as an escrow, and marries before the condition is performed, it is her deed from the first delivery, as otherwise her marriage would defeat it : *Perkins*, 139–140 ; “ for in such case from necessity, and *ut res magis valeat quam pereat*, to this intent by fiction of law, it shall be a deed *ab initio*, and yet in truth it was not her deed until the second delivery.” *Butler and Baker's case*, 3 *Coke*, 36 a. Hence, in accordance with the maxim, *in fictione juris semper equitas*

benefited, the deed would become absolute, though the party delivering were to say in express terms that he

existit, such relation back will not operate to defeat the rights of third persons attaching in the interval: *Frost v. Beekman*, 1 John. Ch. 296; *Green v. Putnam*, 1 Barbour, 504; *Lewis v. Taylor*, Riley's Ch. 179; *Carr v. Hoxie*, 5 Mason, 60; *Merrills v. Swift*, *supra*; and thus in *Jackson v. Rowland*, 6 Wendell, 666, where a deed was delivered as an escrow, and previously to its subsequent absolute delivery a judgment was obtained against the grantor, under which the land was sold, it was held that the purchaser under this judgment took a good title to the land; and so in *Shirley's Lessee v. Ayres*, 14 Ohio, 307.

Where a deed is *rejected* by the grantee, the title revests in the grantor, provided the dissent be made by the party really in interest. Thus, where a conveyance was to A. to the use of B., A.'s dissent was not allowed to defeat the use limited to B. *Gorton's case*, 2 Roll. Ab. 789, pl. 7. In these cases of rejection the question also arises as to intermediate interests and estates created by the deed. In *Thompson v. Leach*, 2 Ventries, 201, it was finally held in the House of Lords, reversing the judgments below, that a deed of surrender by tenant for life to a remainder man, barred intermediate contingent remainders, though the grantee rejected the deed when he knew of it; and in *Read v. Robinson*, 6 Watts and Sergeant, 329, a debtor executed a general assignment for the benefit of his creditors, and delivered it to one of his sons, with instructions to take it to one Ward, who had been making out his father's accounts. Ward took the deed to the assignee, who refused to receive it, and said he would have nothing to do with it. An assignee was then appointed by the Court, who brought trover against the executor of the grantor's will, executed after the assignment. The Court below ordered a nonsuit, on the ground of the refusal of the assignee; but this judgment was reversed by the Supreme Court, which held, that although by the rejection the title might have been remitted to the grantor in case the grantee were the party beneficially interested, yet that the instrument being a trust for creditors, the latter were the parties in interest, and that by the transmission of the deed for acceptance to the assignee, the title instantly passed at law, and it could not be divested by the subsequent disagreement by the assignee; thus showing, as was said by the Chief Justice, in speaking of *Thompson v. Leach*, "that intermediate interests may fasten on the title, which it is not in the power of the grantee's disagreement to unclasp."

intended it to be conditional only; for it is impossible by words to get rid of the legal operation of the delivery, *(t)* and therefore, where the defendant in debt on bond endeavored to set up a delivery as an escrow to the obligee himself, the Court thought that the plea was so clearly bad, that they would not hear any argument upon the subject. Where, however, the deed is delivered to *a third person as an escrow, the deli- [*9] very is, as I said, conditional; and when the condition has been performed, it becomes absolute and takes effect, not from the date of performing the condition, but from the date of the original delivery; so much so, that it has been held, that, where a bond was delivered upon condition, and the obligor and obligee were both dead before the condition was performed, yet, on that event happening, it became the deed of the deceased obligor, so as to create a charge upon his assets as against his representatives. *(u)*

[But, in order to constitute the delivery of a writing as an escrow, it is not necessary that it should be done by express words; you are to look at all the facts attending the execution, to all that took place at the time, and to the result of the transaction; and there-

(t) *Holford v. Parker*, Hob. 246; and Co. Litt. 36 a.

(u) See *Graham v. Graham*, 1 Ves. Jun. 274; *Froset v. Walsh*, Bridg. 51.

It has been suggested by Professor Greenleaf in his edition of *Cruise on Real Property* (tit. xxxii. ch. 1, § 25, note), that *Thompson v. Leach* was not the case of the grant of an estate from the absolute owner to a stranger who had no previous interest in it, but it was the annihilation of a particular estate in favor of a person to whom, on the termination of that estate, at that time, by what mode soever, the whole property would belong by its original limitation, and that the case of *Read v. Robinson* was rather decided upon a local statute, authorizing the Court, in case of renunciation or refusal of a trustee, to appoint a new one in his place. The Court did not, however, rest its decision wholly on that ground.—R.

fore, although it be in form an absolute delivery, if it can reasonably be inferred that it was delivered not to take effect as a deed till a certain condition should be performed, it will nevertheless operate as an escrow.(x)]¹

Such, then, being the essentials of a deed—*writing* on paper or parchment, *sealing* and *delivery*,—it is right to add, that, for the sake of convenience, deeds

(x) *Bowker v. Burdekin*, 11 M. & W. 128.

¹ The point decided in *Bowker v. Burdekin* was, that a deed which was executed as an absolute conveyance, would not the less be an act of bankruptcy, because, on looking at the form of the deed, the conclusion might possibly be come to, that the parties did not contemplate that the deed should operate as an act of bankruptcy unless the whole partnership effects were conveyed. The remark cited *supra*, was said by Baron Parke, to be the result of the cases of *Johnson v. Baker*, 4 Barn. & Ald. 440, 6 E. C. L. R. ; and *Murray v. The Earl of Stair*, 2 Barn. & Cress. 82, 9 E. C. L. R., in both of which cases, the instrument was not delivered to the party interested, but left with a stranger ; and it must not be inferred from the remark in *Bowker v. Burdekin*, that a deed purporting to be absolute, and delivered to a party, can by parol evidence, be shown to have been conditional, as the contrary was expressly held in *Ward v. Lewis*, 4 Pickering, 520, where an insolvent debtor having executed an assignment for the benefit of his creditors, which was found in the hands of the assignee, it was held that the deed could not operate as an escrow, because the *prima facie* evidence was that it was delivered to the party, and that parol evidence was inadmissible to show that the assignment was meant to take effect only upon the assent of the majority of the creditors.—R.

A deed can never be delivered to the grantee himself as an escrow, if intended to operate as such ; it must be delivered to a third person for him. *Jordan v. Pollock*, 14 Georgia, 145. If delivered to the grantee, no matter what may be the form of the words accompanying the act, the delivery will be absolute. *Dawson v. Hall*, 2 Michigan, 390. It is not admissible to show, by parol evidence, that a deed was delivered to the party, on any condition contrary to the terms of the instrument. *Worrall v. Mann*, 1 Selden, 229.

are divided into two classes, *Deeds Poll* and **Indentures*.(y) The names indeed of Deed Poll and Indenture were, as you probably all know, derived from the circumstance that the former was shaved or *polled*, as the old expression was, smooth at the edges; whereas the latter was cut or indented with teeth like a saw; for, in the very old times, when deeds were short, it was the custom to write both parts on the same skin of parchment, and to write a word in large letters between the parts; and then, this word being cut through saw fashion, each party took away half of it; and, if it became necessary to establish the identity of the instrument at a future time, they could do so by fitting them together, whereupon the word became legible.(z) However this, though the origin of the word *indenture*, has become a mere form; and though, as you are all aware, such instruments are still indented by nicking the edge of the parchment, not teethwise, but in an undulating line, that is a mere form, and might (it was said)(a) be done in Court during the progress of a trial, if it had been forgotten till then. [Now, however, it is expressly enacted,(b) “that a deed executed after the 1st day of October, 1845, purporting to be an indenture, shall have the effect of an indenture although not actually indented.”]

*There are one or two peculiarities in the question of a contract made by deed, which, as they apply to all contracts by way of deed, this is the proper place to notice. [*11]

In the first place, *a contract by deed requires no consideration to support it*; or perhaps it might be more

(y) Co. Litt. 35 b; Shepp. Touch. 50.

(z) Co. Litt. 229 a; 2 Bl. Comm. 295.

(a) Bac. Abr. Leases, E. 2, note. But see 54 Geo. 3, c. 96.

(b) 8 & 9 Vict. c. 106, s. 5.

correct to say [as a general proposition], that the law conclusively presumes that it is made upon a good and sufficient consideration.(c)¹ The importance of this arises from the strong line of *distinction it creates between Contracts by Deed and Simple Contracts*. For a simple contract, that is, a contract by words or by writing not under seal, requires, as I shall hereafter have occasion to explain more at length,(d) a consideration to support it, and give it validity. For instance, suppose a written promise in these words:—"I, A. B., promise C. D., that I will pay the debt he owes to E. F." This promise would be absolutely void, unless it could be shown to have been made in consideration of something given or granted to A. B. for making it; for it

(c) *Couch v. Goodman*, 2 Q. B. 580, E. C. L. R. vol. 42.

(d) Lectures 4 & 5.

¹ The proposition in italics, was properly qualified by the lecturer in the remainder of the sentence. At common law no consideration was requisite to the validity of a deed, but since the introduction of conveyances taking effect by virtue of the Statute of Uses, courts of equity, and then courts of law, have held a consideration necessary to support such an instrument. It need not be expressed in the deed, but may be proved. But if expressed, the language of the instrument, so far as the legal effect of the deed is concerned, is conclusive (*Preston on Abstracts*, 14), and although in America, there is a numerous class of cases deciding that the consideration may, by parol, be shown to be greater or less, than is expressed (see *infra*, note 1, to page 17), yet on neither side of the Atlantic is such evidence admitted to defeat the legal effect of the deed as between the parties. *Wilt v. Franklin*, 1 Binney, 502; *Hurn v. Soper*, 6 Harris & Johns. 276. Where the rights of *creditors* step in, the rule is different; *Preston*, *supra*, 1 Am. Lead. Cases, 1. This is merely mentioned, in order that conclusions might not be drawn from the text which the lecturer did not mean to convey, and on page 82, *infra*, he refers to the subject again. It may be here observed that there is another class of instruments which *prima facie* presume a consideration equally with specialties, viz., negotiable instruments. See Mr. Smith's remarks, *infra*, p 97.—R.

would be a promise by him to undertake a liability without any consideration or recompense whatever; and, if he neglected to perform it, no action would lie against him, for the maxim, *ex nudo pacto non oritur actio*, would intervene for his protection. But, if to that very instrument, conceived in those very words, the additional *solemnity of sealing and delivery [*12] were added, so as to make it a deed, it would become a good and binding covenant on which an action might be supported:(*e*) and this is on account of the greater formality and solemnity of such an instrument.(*f*)¹ [Thus, although past seduction is no consideration for a promise to make the woman an allowance for her maintenance,(*g*) a bond founded on such a motive is valid;(h) for past cohabitation and previous seduction are not illegal considerations, they are no considerations at all; and therefore, inasmuch as an instrument under seal is good without any con-

(*e*) See *Fallowes v. Taylor*, 7 T. R. 475.

(*f*) See *Sharington v. Strotton*, Plowd. 308 a; Cruise Dig. tit. xxxii, c. 11, ss. 54 & 55.

(*g*) *Beaumont v. Reeve*, 8 Q. B. 483, E. C. L. R. vol. 55.

(*h*) *Turner v. Vaughan*, 1 Wils. 339; *Nye v. Mosely*, 6 B. & C. 133, E. C. L. R. vol. 13.

¹ Thus in *Kennedy v. Ware*, 1 Barr, 445, the Court refused to give effect to an unsealed assignment of a judgment, intended as an advancement to the assignor's daughter, on the ground that although natural love and affection were sufficient in a sealed instrument to raise a use, yet that they of themselves formed no consideration to support a mere parol gift.—R.

Though in a contest with creditors a bond or conveyance without consideration is void, yet it is not so as between the parties. It may be, and often is an element in the question of actual fraud or duress. "What effect has want of consideration by the common law, in regard to a bond or a judgment? Certainly none to destroy the conclusiveness of the seal or of the recovery. A voluntary bond is, both in equity and at law, a gift of the money." Gibson, C. J., in *Sherk v. Endress*, 3 Watts & Serg. 256.

sideration, a bond for maintenance founded on previous seduction is good. *(i)*¹ There are, however, some deeds deriving their effect from the Statute of Uses, *(k)* that is, a bargain and sale, and a covenant to stand seised to uses, both of which are void without a consideration; the first requiring a pecuniary one, and the latter a consideration of blood or marriage. *(l)* Contracts in restraint of trade also are void, if made without consideration, although under seal. *(m)*]

[*13] *But here again you must observe another well-known and important distinction, namely, that, though it is not necessary to show on what consideration a deed is founded, the party sued on it is always, on his part, allowed to show that it was founded on an illegal or immoral consideration, or that it was obtained by duress or by fraud; for, were the law otherwise, deeds would, to use the expression of Lord Ellenborough, *(n)* be made use of as covers for every description of iniquity. It is therefore a well-established proposition, that a deed

(i) Bridges v. Fisher, 23 L. J. (Q. B.) 276, in Exchequer Chamber.
(k) 27 Hen. 8, c. 10.

(l) Shepp. Touch. 510; 2 Bl. Comm. 338.

(m) Mitchell v. Reynolds, 1 P. Wms. 181. See Wallis v. Day, 2 M. & W. 277; * Horner v. Graves, 7 Bing. 744, E. C. L. R. vol. 20; Hutton v. Parker, 7 Dowl. 739; Mallan v. May, 11 M. & W. 665.* See Tallis v. Tallis, 21 L. J. (Q. B.) 185.

(n) Paxton v. Popham, 9 East, 421.

¹ The seduction of an innocent woman by a pretended marriage is a valuable consideration for a deed subsequently made to her and her children. Doe v. Horn, 1 Carter, 363. This was a case in which the question arose as to creditors, and, of course, as to them being third parties, the seal was unimportant. A seal does not protect an illegal contract founded on a consideration, *contra bonos mores*. Gray v. Hook, 4 Comst. 449. There is one American case which accords with the doctrine that past cohabitation is not a good consideration to support a promise. Singleton v. Bremer, Harper, 201. But Shenk v. Mingle, 13 Serg. & Rawle, 29, rules expressly the contrary.

may be invalidated by showing that it is tainted by such circumstances.(o) And it signifies not whether the illegality objected to it be a breach of the rules of common law, or consist in the contravention of the provisions of some statute, [or whether the prohibition of the statute be expressed in direct terms, or be left to be collected from a penalty being inflicted on the offender.(p)] Thus in *Collins v. Blantern*,¹ the consideration was the compromise of an indictment for perjury; in *Coppock v. Bower*,(q) the compromise of an election petition; in **Hindley v. M. of Westmeath*,(r) a future separation between husband [*14] and wife.(s) In these cases the illegality consisted in the infringement of the rule of the Common Law, which looks upon such contracts as improper. In other cases, as I said, the contravention of a statute has been held equally fatal: as, of the statute against gaming;(t) of the acts for licensing playhouses;(u) [of the stat. 9 Anne, c. 16, for requiring brokers acting within the city and liberties of London to procure themselves to be admitted by the Lord Mayor and Aldermen.(x)]

(o) See *Collins v. Blantern*, 2 Wils. 341; 1 Smith L. C. 154.

(p) *Bartlett v. Vinor*, Carth. 251; *Cundell v. Dawson*, 4 C. B. 376, E. C. L. R. vol. 56; *Ritchie v. Smith*, 6 C. B. 462, E. C. L. R. vol. 60; *Cope v. Rowlands*, 2 M. & W. 149; * *M'Kinnell v. Robinson*, 3 M. & W. 434.* (q) 4 M. & W. 361.*

(r) 6 B. & C. 200, E. C. L. R. vol. 13.

(s) See *Jones v. Waite*, 5 Bing. N. C. 341, E. C. L. R. vol. 35; 4 M. & Gr. 1104, E. C. L. R. vol. 43; in Dom. Proc.; *Wilson v. Wilson*, 23 L. J. (Ch.) 697.

(t) *Colborne v. Stockdale*, Str. 493; *Mazzinghi v. Stephenson*, 1 Camp. 291. See *M'Kinnell v. Robinson*, 3 M. & W. 434,* which, however, was a simple contract.

(u) *Levy v. Yates*, 8 A. & E. 129, E. C. L. R. vol. 35; see *De Begnis v. Armistead*, 10 Bing. 110, E. C. L. R. vol. 25.

(x) *Cope v. Rowlands*, 2 M. & W. 149.*

¹ And see the notes to that case in 1 Smith's Lead. Cases, 412, 4th Am. Ed.—R.

And a great variety of examples might be given,¹ but these are sufficient to establish the principle, that,

¹ "Every contract," said Lord Holt, in *Bartlett v. Viner*, Carthew, 252, "made for or about any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute;" and although attempts have been at times made to consider these words as mere dicta, yet the rule thus stated has been repeatedly enforced: *Nerot v. Wallace*, 3 Term, 17; *Mitchell v. Smith*, 1 Binney, 118; *Foster v. Taylor*, 5 Barn. & Adolp. 887, 27 E. C. L. R.; *Cope v. Rowland*, 2 Mees. & Welsby, 158; though with respect to cases depending upon the English revenue laws, there appears to be a little discrepancy of decision as to whether those acts intended to vitiate the contract, or to impose a penalty, for the purposes of the revenue, on the party offending. *Johnson v. Hudson*, 11 East, 180; *Brown v. Duncan*, 10 Barn. & Cresswell, 93, 21 E. C. L. R.; *Wetherill v. Jones*, 3 Barn. & Ald. 221, 5 E. C. L. R.; *Cope v. Rowland*, 2 Mees. & Welsby, 158, *Smith v. Mawhood*, 14 Id. 461. Some of these decisions are referred to in a very recent case in the Supreme Court of the United States (*Harris v. Runnels*, 12 Howard, 84), where, as a defence to the purchase-money of certain slaves, it was set up that no certificate had been obtained previous to the bringing the slaves into the State of Mississippi, that they had not been guilty of any crime, &c., as was required by a law of that State, which imposed a penalty of \$100 for every slave so purchased and brought in; and the Court, in holding the contract itself not vitiated by this statute, said, "We have concluded, before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty, or a penalty only for doing a thing which it forbids, that the statute must be examined as a whole, to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not to be so. In other words, whatever may be the structure of the statute in respect to prohibition and penalty, or penalty alone, that it is not to be taken for granted that the legislature meant that contracts in contravention of it were to be void, in the sense that they were not to be enforced in a court of justice. In this way the principle of the rule is admitted, without at all lessening its force, though its absolute and unconditional application to every case is denied. It is true that a statute, containing a prohibition and a pen-

though a man cannot defend himself from liability upon his contract made by deed by saying that there was no consideration for it,¹ he may by saying that there was an illegal one.² [And it must be observed, that a contract, although not expressly prohibited by a statute,

alty makes the act which it punishes unlawful, and the same may be implied from a penalty without a prohibition; but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it; when the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void."—R.

¹ Nor at common law would fraud be a defence to an action on a specialty, unless, indeed, the fraud related to the execution of the instrument: *Vrooman v. Phelps*, 2 Johnson, 178; *Rogers v. Colt*, 1 Zabriskie (N. J.), 704; but in many of our States, the common law rule as to the solemnity of a seal stopping the obligor from any defence except those named, has been relaxed by statutory provisions, so as to entitle the obligor of a bond, under some restrictions, to show, by way of defence, its failure, as he formerly could have done its illegality of consideration.—R.

² The often-quoted remarks of Lord Mansfield upon this rule, may bear repetition here. "The objection," said he, "that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating, or otherwise, the cause of action appears to arise, *ex turpi causa*, or the transgression of a positive law of this country, then the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, '*potior est conditio defendentis*.'" *Holman v. Johnson*, Cowper, 843; *Gray v. Hook*, 4 Comstock, 449.—R.

may be illegal, if opposed to the general policy and intent thereof, as if made to insure to one creditor of a bankrupt a greater share of his debt than the others can [*15] *have; (*y*) or a contract made in order to enable another to infringe that policy and intent, (*z*) as if money be lent in order to enable the borrower to pay or compound differences on illegal stock-jobbing transactions, although the lender was no party to them. These contracts are invalid and cannot be sued upon, although under seal.] Even if there were several considerations, and any one of them was illegal, it avoids the whole instrument; for it is impossible to say how much or how little weight the illegal portion may have had in inducing the execution of the entire contract. (*a*) [Thus, the plaintiffs, who were proprietors of a newspaper, having at the defendant's request published in it a libel, and one Chalmers having sued them upon it, the defendant, in consideration that they would defend the action, undertook to indemnify them from all damages and costs to which they might be liable on account of having published the libel and of defending the action; but it was decided, that, as the part of the consideration of this indemnity, consisting of the publication of the libel, was illegal, the whole contract was tainted with this illegality, and no action upon the indemnity [*16] could be *supported. (*b*)] Though it is just the reverse where the consideration is good, and

(*y*) *Staines v. Wainwright*, 6 Bing. N. C. 174, E. C. L. R. vol. 37. See *Ex parte Oliver, Re Hodgson*, 4 De G. & S. 354.

(*z*) *M'Kinnell v. Robinson*, 3 M. & W. 434; *Cannan v. Brice*, 3 B. & Ad. 185, E. C. L. R. vol. 23; *De Begnis v. Armistead*, 10 Bing. 110, E. C. L. R. vol. 25.

(*a*) *Waite v. Jones*, 1 Bing. N. C. 662, E. C. L. R. vol. 27; *Shackell v. Rosier*, 2 Bing. N. C. 634, E. C. L. R. vol. 29; *Howden v. Haigh*, 11 A. & E. 1033, E. C. L. R. vol. 39.

(*b*) *Shackell v. Rosier*, 2 Bing. N. C. 634, E. C. L. R. vol. 29.

there are several covenants, some legal, some illegal; for then the illegal promises alone would be void, and the legal valid. (c) [As when, upon a dissolution of partnership, one partner purchased the other's moiety, and the latter covenanted not to carry on a similar trade within the cities of London and Westminster, or within 600 miles thereof, the Exchequer Chamber held that the covenant was void as to the 600 miles, as an unreasonable restraint of trade; but good as to the cities of London and Westminster. (d)]

The next peculiarity of a contract by deed is its operation by way of *estoppel*; the meaning of which is, that the person executing it is not permitted to contravene or disprove what he has there asserted, though he may where the assertion is in a contract not under seal. A good example of this is the case of a receipt. A *creditor* who has given a receipt not under seal is nevertheless permitted to prove that he has not received the money; (e) but it is otherwise if the receipt be by deed, for then the law admits no evidence to the contrary. (f)¹ *Such is the nature [*17] of what we call an *estoppel* created by deed, (g)

(c) Gaskell v. King, 11 East, 165; How v. Synge, 15 East, 440.

(d) Price v. Green, 16 M. & W. 346; * Nicholl v. Stretton, 10 Q. B. 346, E. C. L. R. vol. 59.

(e) Graves v. Key, 3 B. & Ad. 313, E. C. L. R. vol. 23; Stratton v. Rastall, 2 T. R. 366.

(f) See the judgment of the Court in Fitch v. Sutton, 5 East, 230.

(g) Hill v. Manchester and Salford Waterworks, 2 B. & Ad. 544, E. C. L. R. vol. 22.

¹ The current of authority, however, on this side of the Atlantic has much relaxed the strictness of the English cases on this subject. Thus it may be considered as settled, notwithstanding some early cases to the contrary, that evidence is admissible, either on the part of the grantor or the grantee, to show that the consideration named in a

the principle of which is explained by TAUNTON, J., in *Bowman v. Taylor* :^(h) "The principle is, that, where a man has entered into a solemn engagement by and under his hand and seal as to certain facts, he shall not be permitted to deny any matter he has so asserted;" and therefore, for example, [if a distinct statement of a particular fact is made in the recital of a bond or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true, that, as between the parties to that instrument, and in an action upon it, it is not competent for the party bound to deny the recital.]⁽ⁱ⁾ But an allegation must,

(h) 2 A. & E. 278, E. C. L. R. vol. 29.

(i) *Carpenter v. Buller*, 8 M. & W. 207; * *Pilbrow v. Pilbrow's Atmospheric R. C.* 5 C. B. 440, E. C. L. R. vol. 57.

deed was really greater or less than is there expressed. *Bullard v. Briggs*, 7 Pickering, 533; *Wade v. Mervin*, 11 Id. 288; *Clapp v. Tirrell*, 20 Id. 247; *M'Crea v. Purmort*, 16 Wendell, 460 (where many authorities are cited and commented on); *Burbank v. Gould*, 15 Maine, 118; *Belden v. Seymour*, 8 Connecticut, 310; *Meeker v. Meeker*, 16 Connecticut, 383; *Beach v. Packard*, 10 Vermont, 96; *Bingham v. Weiderwax*, 1 Comstock, 509; *Watson v. Blain*, 12 Serg. & Rawle, 131; *Jack v. Dougherty*, 3 Watts, 158; *Bolton v. Johns*, 5 Barr, 145; *Harvey v. Alexander*, 1 Randolph, 219; *Wilson v. Shelton*, 9 Leigh, 342; *Curry v. Lyles*, 2 Hill (S. C.), 404; *Moore v. M'Kee*, 5 Smedes & Marshall, 438; unless such evidence is introduced, either directly or indirectly, for the purpose of defeating the operation of the instrument as a conveyance, as by showing it void for want of a sufficient consideration. *Wilt v. Franklin*, 1 Binney, 502; *Hurn v. Soper*, 6 Harris & Johnson, 276. Thus a grantee may prove the expressed consideration to be greater, for the purpose of increasing his damages on the covenants in the deed: *Belden v. Seymour*, 8 Connecticut, 310; while on the other hand, the grantor may prove it less for the purpose of diminishing them. *Morse v. Shattuck*, 14 New Hampshire, 229; *Harlow v. Thomas*, 15 Pick. 70.—R.

See *Murphy v. Branch Bank at Mobile*, 16 Alabama, 90; *Wooden v. Spotwell*, 3 Zabriskie, 465; *In re Young's Estate*, 3 Maryland Chancery Decis. 461.

in order to operate as an *estoppel*, be clear, distinct, and definite.^(k) Such a recital is indeed the hypothesis upon which such contract is made by the parties; and therefore, it would quite overthrow their mutual intention, if, in the absence of fraud, the recital could be denied. Accordingly, the *estoppel* has no effect in matters not depending upon such contract; and even a party to a deed is not estopped in an action by another party, not founded on the deed and wholly collateral to it, *to dispute the facts so admitted [*18] therein; but evidence of the circumstances under which such admission was made, is receivable to show that it was inconsiderately made, and is not entitled to weight as a proof of the fact it is used to establish.^(l) An instructive instance of an *estoppel* is afforded by the case of *Wiles v. Woodman*.^(m) In this case the plaintiff and defendant had been in partnership together as paper manufacturers and iron merchants. The partnership was dissolved by deed, by which it was recited that an agreement had been made that the defendant should have all the stock in trade of the business of paper merchants, but that the plaintiff should receive paper out of that stock to the value of 898*l.* 4*s.* 11*d.*, which was to remain in the paper mill for a year. On the other hand, the plaintiff was to have the stock in trade in the iron business. The deed further recited, that, in pursuance of that arrangement, paper of that value had been actually delivered to the plaintiff, and that the same then was in the paper mill, as the plaintiff acknowledged. It then contained an assignment by the defendant to the plaintiff of all the stock in trade of the iron business,

(k) *Doe d. Jeffereys v. Bucknell*, 3 B. & Ad. 278, E. C. L. R. vol. 23; *Lainson v. Tremere*, 1 A. & E. 792, E. C. L. R. vol. 28.

(l) *Carpenter v. Buller*, *supra*.

(m) 5 Exch. 557.*

and by the plaintiff to the defendant of all the stock in trade of the paper-making business, except the 8987. 4s. 11d. worth of paper delivered to the plaintiff, and mutual releases, and a dissolution of the old partnership. In fact no paper had been delivered *or [*19] set apart; and in an action of trover for it, it was contended by the defendant, that no certain quantity having become the property of the plaintiff, no definite paper could be said to be his; and consequently, that an action of trover, not being an action on the deed, and which implies that the thing sued for is the plaintiff's, could not be supported. But the Court of Exchequer considered that the parties were estopped by the deed, not merely in an action thereon, but in this proceeding, which was to enforce the rights arising out of it; and the Court said, that a recital, when it is of a fact agreed upon by both, binds both; and the present claim is not collateral to the deed as in *Carpenter v. Buller*. It is, therefore, an estoppel on both. The parties have agreed, with respect to the stock in trade in the paper business, that they should stand precisely in the same situation as if the stock had been divided, and part to the stipulated amount delivered to the plaintiff; and, being in that situation, the question is what their respective rights are?]¹

¹ One of the most frequently occurring instances of estoppel in pais, or, as it should be in this case more correctly termed, equitable estoppel, is the rule which, in its general application, prohibits the tenant from denying his landlord's title, and which, although it has been supposed to have been feudal in its origin, seems to have arisen in later times. See Mr. Hare's note to *Duchess of Kingston's case*, 2 Smith's Leading Cases, 569, 4th ed.; *Morris on Replevin*, 121. "The principle was of necessity called into being by that feature of the action of ejectment which requires an absolute possessory title in the plaintiff, and makes, in its absence, the mere fact of possession, decisive in favor of the defendant. The result of allowing the

The next peculiarity in a contract by deed is its effect in creating a *merger*. This happens when

tenant to deny the right of the landlord, in an ejectment for the land, would therefore be to take the estate from the latter, and confer it on the former, whenever there was a defect, either in the title itself, or the proof brought forward to sustain it. This would obviously be equally inconsistent with public policy and private faith, and would prevent men from letting their property, even when they are unable to use it themselves. When, therefore, possession is obtained under a lease, the lessee is estopped from keeping the land in violation of the agreement under which it was acquired." Note to *Duchess of Kingston's* case.

The rule therefore is a very general one with respect to an ejectment brought by the landlord against the tenant (unless, indeed, in the case where the assent of the latter is produced by the fraud or misrepresentation of the former, *Miller v. M'Brien*, 14 Serg. & Rawle, 382; *Hockenburg v. Snider*, 6 Watts, 44), and also with respect to actions brought by the landlord to recover the rent, for the "mischief to which the absence of such a rule as between landlord and tenant must lead, would evidently be that a tenant, having obtained the possession from his landlord, could betray it to another, and thus drive the former to an ejectment to regain the possession. The result would be that no landlord would ever be safe from the prospect of litigation. Hence the tenant's obligation to restore to him the possession." Rawle on Covenants for Title, 235. It may also be observed that where the lease is by indenture, the law of "estoppel by deed" applies. *Jordan v. Twells*, Rep. temp. Hardwicke, 161; *Palmer v. Ekins*, 2 Raymond, 1351. And where the action is assumpsit for use and occupation, the issue sought to be raised by the question of title is an immaterial one. *Lewis v. Willis*, 1 Wilson, 314; *Doe v. Smythe*, 4 Maule & Selw. 347; *Cobb v. Arnold*, 7 Metealf, 398.

The rule only operates, however, to debar the tenant from denying the title at the time of possession given, and he is at liberty to show that it has since expired or been defeated: *Walton v. Waterhouse*, 1 Wms. Saunders, 418, note; *Hollicraft v. Keep*, 2 Moore & Scott, 767; *Jaekson v. Rowland*, 6 Wend. 666; *Devatch v. Newson*, 3 Hammond, 57; *Randolph v. Carlton*, 8 Alabama, 606; or such circumstances as amount to a constructive eviction, as by being compelled to make payments to a mortgagee, ground landlord, &c. *Doe v. Barton*, 11 Ad. & Ell. 314, 39 E. C. L. R.; *Mayor of Poole v. White*, 15 Mees. & Welsby, 577; *Waddilove v. Barnett*, 2 Bing. N. C. 538, 29 E. C.

an engagement has been made by way of simple contract, that is, by words in writing not under seal, and afterwards the very same(n) engagement is entered into between the same parties *by a deed. [*20] When this happens, the simple contract is merged, lost, sunk, as it were, and swallowed up in that under seal, and becomes totally extinguished.(o) Suppose, for instance, I give my creditor a promissory note for 50*l.*, and then a bond for the same demand, the note is lost, swallowed up in the bond, and becomes totally extinct and useless.(p)¹ [It is almost obvious

(n) See *Yates v. Aston*, 4 Q. B. 182, E. C. L. R. vol. 45.

(o) *Price v. Moulton*, 20 L. J. (C. P.) 102.

(p) *Bayley on Bills*, 6th edition, 334.

L. R. ; *Franklin v. Carter*, 1 C. B. 760, 50 E. C. L. R. ; *Jones v. Clark*, 20 Johnson, 51 ; *Magill v. Hinsdale*, 6 Connecticut, 469 ; *Smith v. Sheppard*, 15 Pick. 147 ; *Weld v. Adams*, 1 Metcalf, 494 ; *George v. Putnay*, 4 Cushing, 355 ; *Greno v. Munson*, 9 Vermont, 37 ; *Chambers v. Pleak*, 6 Dana, 428.—R.

One entering as a sub-tenant is in like manner estopped from denying the title of the paramount landlord : *Milhouse v. Patrick*, 6 Richardson, 350 ; when one, however, already in possession, acknowledges himself to be the tenant of another, he may destroy the effect of such acknowledgment, by showing that it was procured by fraud or proceeded from a clear mistake as to title. *Givens v. Mullinux*, 4 Richardson, 590. The gratuitous payment of rent by one in possession of real estate does not estop him from showing the true character in which he holds the premises. *Shelton v. Carroll*, 16 Alabama, 148. And see upon the general principle of a tenant's being estopped from controverting his lessor's title, *Cody v. Quarterman*, 12 Georgia, 386 ; *Freeman v. Heath*, 13 Iredell, 498 ; *Sims v. Glazener*, 14 Alabama, 695 ; *Pope v. Haskins*, 16 Id. 321 ; *Hoen v. Simmons*, 1 California, 119 ; *Henley v. The Branch Bank*, 16 Alabama, 552. A tenant, after the tenancy has terminated, and he has restored the possession to his landlord, may assert a title paramount against him, and the previous tenancy cannot bar his right to recover. *Smith v. Mundy*, 18 Ibid. 182.

¹ *Curson v. Monteiro*, 2 Johnson, 308 ; *Bray v. Bates*, 9 Metcalf, 250 ; and see *passim* the notes to *Cumber v. Wane*, in 1 Smith's

that in these cases the engagement by deed must be so completely identical with that by the simple contract,

Lead. Cases. The operation of this principle of law, and the distinction between a merger and a satisfaction of a debt, have been thus ably pointed out by Gibson, C. J., in *Jones v. Johnson*, 3 Watts & Serg. 277: "There is a substantial distinction, which I have not seen particularly noticed, between cases of extinguishment by merger of the security, and cases of extinguishment by satisfaction of the debt. These classes, though depending on different principles, have usually been confounded, and hence a perceptible want of precision in the language of those who have written or spoken of them. In the first of them the original security is extinguished, but the debt remains; in the second, the debt as well as the security is extinguished by the acceptance of another debt in payment of it. Extinguishment by merger takes place between debts of different degrees, the lower being lost in the higher, and, being by act of law, it is dependent on no particular intention; extinguishment by satisfaction takes place indifferently between securities of the same degree or of different degrees, and, being by act of the parties, it is the creature of their will. No expression of intention would control the law which prohibits distinct securities of different degrees for the same debt; for no agreement would prevent an obligation from merging in a judgment on it, or passing in *rem judicatam*. Neither would an agreement, however explicit, prevent a promissory note from merging in a bond given for the same debt by the same debtor; for, to allow a debt to be, at the same time, of different degrees, and recoverable by a multiplicity of inconsistent remedies, would increase litigation, unsettle distinctions, and lead to embarrassment in the limitation of actions, and the distribution of assets. But as the existence of a promissory note as a concurrent security for a book debt produces no such consequences, it operates no extinguishment by act of the law; and it depends on the assent of the parties, tacit or explicit, whether the new evidence of the debt is accepted in discharging the old one. It is true there are presumptions which operate even in cases of intention, as *prima facie* evidence on the one side or the other; for instance, that a bond given by a stranger after the debt incurred was accepted as collateral security. These, however, are legal presumptions of mere facts to be drawn by the jury under the direction of the Court, and not, as in merger, *presumptiones juris et de jure*, which are so absolute that they cannot be rebutted.

"But, merger takes place only where the debt is one, and the

that the remedy thereupon must be coextensive with the latter.(q)]

(q) *Ansell v. Baker*, 15 Q. B. 20, E. C. L. R. vol. 69.

parties to the securities are identical. Hence, there is no extinguishment where a stranger gives bond for a simple contract debt, or confesses a judgment for a debt by specialty. In either case the original debt may be extinguished by the subsequent one, but not by merger, which works a dissolution not of the debt, but of the original security, whose existence sinks into that of the succeeding one, and for that purpose the union must be so intimate that the one cannot be separated from the other. In a case of merger, therefore, the debt is the same, though the old evidence of it melts into the new one, and the creditor merely gains a higher security without having an indivisible debt of different degrees, but such a result is not obtained where the debt is compounded of new responsibilities, as it must be where all the parties were not originally bound. When the debtor is bound with a stranger, or for a different sum, his responsibility is changed in more respects than the quality of the security. The difference, on the whole, consists in this, that in a case of merger there is a change only of the security; but, in a case of satisfaction by substitution, there is a change of the debt."

But although the intention of the parties cannot prevent the operation of a merger when a higher security is taken for a lower one, on the ground that there cannot be two distinct liabilities for *the same debt*, yet it is also undoubtedly settled that it may be shown that the higher security is taken as collateral for the payment of the lower, that is to say, that it is a new security for a new debt, intended to protect the first: *Yates v. Aston*, 4 Queen's Bench, 196; *Ansel v. Baker*, 15 Id. 20; *Railway Co. v. M'Namara*, 3 Excheq. 627; *U. S. v. Lyman*, 1 Mason, 505; *Averill v. Loucks*, 6 Barbour, 470; *Butler v. Miller*, 5 Denio, 159; although the presumption where the bond is between the same parties, and for the same sum is that the new security was taken as a satisfaction. *Frisbie v. Larned*, 21 Wendell, 450; *Stewart's Appeal*, 3 Watts & Serg. 476; *Bond v. Aitken*, 6 Id. 165; *Butler v. Miller*, *supra*; *Price v. Moulton*, 2 Eng. Law & Eq. R. 307.

A very common instance of the operation of merger occurs in the sale of real estate, when by the acceptance of the deed which consummates the transaction the articles of agreement are annulled. *Howes v. Barker*, 3 Johns. 506; *Houghtaling v. Lewis*, 10 Johnson, 299; *Wilson v. M'Neal*, 10 Watts, 427; *Creigh v. Beelin*, 1 Watts

Another peculiar incident to a contract by deed is, that its obligation cannot be got rid of by any matter of inferior degree: thus, a verbal license will not exempt a man from liability for breach of his covenant. [The reason of this rule is so clearly expressed in the Countess of Rutland's case,^(r) that it is worth while to introduce it in the words of Lord Coke: "It would be inconvenient that matters in writing, made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties, to be proved by the uncertain testimony of slippery memory. And it would be dangerous to purchasers and all *others in such case, if such nude averments [*21] against matter in writing should be admitted." The last case on this subject is *West v. Blakeway*;^(s) there a tenant had covenanted not to remove a green-house, and it was held no defence for him against an action for so doing, that he had his landlord's subsequent permission so to do, that permission not being shown to have been under seal. "It is a well-known rule of law," said the Lord Chief Justice, "that *unumquodque ligamen dissolvitur eodem ligamine quo et ligatur*. This is so well established," continued his Lordship, "that

(r) 5 Co. Rep. 25.

(s) 2 M. & Gr. 729, E. C. L. R. vol. 40.

& Sergeant, 83; *Williams v. Morgan*, 15 Queen's Bench, 789, 69 E. C. L. R.; unless in case of fraud or mistake: *Lee v. Dean*, 3 Whart. 316; *Jenks v. Fritz*, 7 Watts & Sergeant, 201; or unless part of the consideration should be the future performance of certain stipulations in the articles, in which case, the deed may be considered not so much a merger of the original contract as a part performance of it. *Selden v. Williams*, 9 Watts, 12; *Brown v. Moorhead*, 8 Serg. & Rawle, 569. In the latter case, however, it is said that to rebut the presumption that the law would otherwise make (viz., that of the merger), the intention to the contrary must be clear and manifest. *Seitzinger v. Weaver*, 1 Rawle, 385.—R.

it appears to me unnecessary to refer to cases. I will mention only *Rogers v. Payne*,^(t) which was an action of covenant for the non-payment of money; the defendant pleaded a parol discharge in satisfaction of all demands. It was held upon demurrer that the covenant could not be discharged without deed, and *Blake's case*^(u) was cited."¹

(t) 2 Wils. 376.

(u) 6 Co. Rep. 43 b. See also *Harris v. Goodwyn*, 2 M. & Gr. 459, E. C. L. R. vol. 40.

¹ *West v. Blakeway* must be considered as laying down a more rigid rule than has been observed on this side of the Atlantic, where there have been many decisions to the effect that a parol dispensation with the performance of a sealed contract is valid (and similar in its effect to a license to exercise dominion over land, which, while unrevoked, is a justification for any acts done under its authority), upon the ground, that although the contract itself cannot be dissolved unless by an instrument of equal solemnity as that creating it, yet that the rights proceeding from it may be varied or released by parol: *United States v. Howell*, 3 Wash. C. C. R. 620; *Fleming v. Gilbert*, 3 Johns. 528; *Langworth v. Smith*, 2 Wendell, 587; *Dearborn v. Cross*, 7 Cowen, 48; *Leavitt v. Savage*, 16 Maine, 72; *Marshall v. Craig*, 1 Bibb, 379; and such was the view taken in the earlier English cases: 1 Roll. Abr. 453, pl. 5; *Id.* 455, pl. 1; *Year Book*, 2 Hen. 6, 37; *Ratliffe v. Pemberton*, 1 Espinasse, 35; *Blackwell v. Nash*, 1 Strange, 535; *Jones v. Barkley*, Douglass, 684; in which case it was held that a tender of performance and waiver of it (the evidence of which must always rest in parol), were equivalent to actual performance. In *Cordwent v. Hunt*, 8 Taunton, 596, it was, however, held that in an action of covenant for not erecting a threshing mill, it was no defence that the omission to do so was at the special request of the plaintiff. This case was followed by *West v. Blakeway*, *supra*, where the defendant had, in a lease executed to him by the plaintiff's testator, covenanted not to remove any buildings erected on the premises during the term, and the breach alleged was that he had permitted the removal of a greenhouse, to which the defendant pleaded that after the execution of the lease, the term had been assigned to a third person, to whom the plaintiff's testator promised that if he would erect the greenhouse, he should have liberty to remove it at the expiration of the lease. Under these circumstances, as has been well ob-

[It is another advantage of a contract by deed over a simple contract,(*x*) that although, as is well known, a chose in action is not assignable by law, yet, where the contract is one between landlord and tenant, and is such as in its nature to affect directly the estates of either of them, which in law *is called running [*22] with the land,(*y*) the benefit and the burden of that contract when under seal will, if the estate of either is assigned, pass with the reversion or the term to the new landlord or to the new tenant. This is partly by force of the common law, and partly by force of the stat. 32 Hen. 8, c. 34,(*z*) an Act passed shortly after the dissolution of the monasteries, and rendered necessary thereby. For, as by the common law, neither the benefit nor the burden of a contract could in general be transferred by assignment, it became necessary, when so many reversions of estates held by farmers and tenants, for lives or years, were alienated, to give to the purchasers or alienees the same rights against the farmers or tenants as the lessors had; and the legislature naturally and equi-

(*x*) *Standen v. Christmas*, 16 L. J. (Q. B.) 266; *Brydges v. Lewis*, 3 Q. B. 603, E. C. L. R. vol. 43.

(*y*) *Spencer's case*, 5 Co. Rep. 16, 1 Smith L. C. 22; *Vernon v. Smith*, 5 B. & Ald. 1, E. C. L. R. vol. 7.

(*z*) *Thursby v. Plant*, 1 Wms. Saund. 240.

served of this case, there can be no question that upon familiar principles, a parol license to remove the greenhouse would have protected a party in so doing, if the greenhouse had at the time of the license been in actual existence and in the possession of the lessor; and the effect of the decision was therefore to deny the operation of such a license, as a protection, while the title to the greenhouse rested on an executory contract, thereby holding that the right of a party can be greater under a contract while yet executory, than after it had passed into execution and conferred an actual title. 2 American Leading Cases, 758, License. Such a course of decision, however, has not, as we have seen, been followed in this country.—R.

tably went on to give corresponding rights to the farmers and tenants.]

Again, a deed has this further advantage of a simple contract, that, in case of the death of the party bound by it, it charges his heir (if the deceased bound his heirs by using words for that purpose in the deed) to the extent of any assets that may have descended to him.

You will find the nature of the heir's liability fully explained in the notes to *Jefferson v. Morton*.(a) If, [*23] indeed, the debtor had devised the *land away, instead of allowing it to descend to his heir, the creditor could not at common law have sued the devisee. However, by stat. 3 W. 3, c. 14, usually called the Statute of Fraudulent Devises, the devisee was made liable as well as the heir. [But, as this statute did not provide for the case of there being no heir, the land in that event going to the lord by escheat if there was no devisee, or to the devisee if one was designated by the will; a distinction which it is sometimes important to observe,(b)] it was repealed, and its enactments repeated, making the devisee in such case liable, with several other improvements, in stat. 1 W. 4, c. 47, usually called Sir Edward Sugden's Act.(c)

While on this subject, it may as well be mentioned, that, although the right of bringing an action against the heir or devisee is limited to specialty creditors, yet, by a statute of 3 & 4 W. 4, c. 104, the simple contract creditors have a remedy against the real estate of the deceased in equity, where, however,

(a) 2 Wms. Saund. 6.

(b) *Hunting v. Sheldrake*, 9 M. & W. 256.*

(c) See *Hunting v. Sheldrake*, 9 M. & W. 263.* On the construction of this statute, you may see *Farley v. Briant*, 3 A. & E. 839, E. C. L. R. vol. 30.

their claims are, by the express enactment of the statute, postponed to those of creditors by deed in which the heirs of the deceased are mentioned. [And by this Act lands escheating for want of heirs are made assets.(d)]

*In the administration of the personal effects, [*24] also, the specialty creditors have, as you are probably aware, a priority over those by simple contract.(e)¹

Lastly, with regard to the remedy upon a contract by deed: wherever a promise is made by deed, the performance may be enforced by an action of covenant: and, if a liquidated debt be secured by it, by an action of debt. These remedies must be pursued within twenty years, except in cases of disability by reason of infancy, coverture, lunacy, or absence beyond seas, such being the period fixed by 3 & 4 W. 4, c. 42, s. 3,² which, being later in date though passed in the

(d) *Evans v. Brown*, 5 Beav. 114; *Cummins v. Cummins*, 3 J. & L. 64. (e) *Pinchorn's case*, 9 Co. Rep. 88 b.

¹ A striking difference has existed between the course of legislation on the different sides of the Atlantic, with respect to the liability of estates of decedents for the payment of their debts, and although the rules in the different States must necessarily be local in their application, yet it may, in general, be said that in this country lands are liable for the debts of a decedent, whether due by matter of record, specialty, or simple contract, and that in the two latter cases, although they create no lien during the debtor's life, yet by his death their quality is changed, and they become liens on the real estate, which descends to the heir, or passes to the devisee, subject to the payment of the debts of the ancestor, according to the local laws of the State.—R.

² By these statutes a positive bar is interposed to a recovery upon specialties after twenty years. Before their passage, there was only the common law presumption of payment or performance, which was liable to be rebutted by testimony, and in this country it is believed that statutes similar to that of Will. 4, have not been generally enacted.—R.

same session with 3 & 4 W. 4, c. 27, is held to have superseded some inconsistent provisions contained in that statute.^(f) [The Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, ss. 68 to 86, also gives some remedies in the nature of specific performance and prevention, by means of the writs of mandamus and injunction, which will probably be found of great use in securing the performance of contracts.]

Having thus touched on the general division of Contracts into those of Record, by Deed, and by Simple Contract, and explained the nature of a deed, and the [*25] formalities attending its *execution,—having pointed out the distinction between the absolute delivery of a deed and the conditional one of an escrow, the distinction between a deed poll and indenture, the peculiar privileges of a contract by deed, whether in respect of the consideration, the estoppel it creates, the means by which its obligation is determined, or the rights which it confers upon a creditor against his debtor's assets,—having pointed out the remedy by which its non-performance is complained of in a Court of law, and the time of limitation within which that remedy is to be pursued, it remains to point out in a similar manner the peculiarities attending Simple Contracts. This will be done in the next Lecture.

(f) See *Strachan v. Thomas*, 12 A. & E. 536, E. C. L. R. vol. 40; *Paget v. Foley*, 2 Bing. N. C. 679, E. C. L. R. vol. 29.

*LECTURE II.

[*26]

THE NATURE OF SIMPLE CONTRACTS.—OF WRITTEN CONTRACTS.—THE STATUTE OF FRAUDS.

IN the last lecture, I compressed the observations I had to make on the general nature of Contracts under Seal. I now arrive at the class denominated *Simple Contracts*, which comprises all of a degree inferior to deeds, whether they be verbal or written. For though, as I shall presently explain to you, there is, in many respects, a very wide distinction between Simple Contracts which are *written* and those which are verbal merely; yet the law of England includes them in one class, and denominates them all by the same term *Simple Contracts*. And, indeed, they are so far alike, that they all, whether verbal or written, are subject to those marks of inferiority to contracts by deed which you heard described in the last Lecture.

Thus, they do not create an estoppel; they are capable of being put an end to without the solemnity of a deed. They form no ground of action against the heir or devisee, even though he be expressly named in them; and they require a consideration to support and give them validity, though, as I shall have occasion to explain in a future *lecture, there is one [*27] case, even among Simple Contracts, in which the consideration need not be shown, but is presumed to exist unless its existence can be disproved. In these

respects, all simple contracts are like one another. But there are two great differences between written and verbal contracts not under seal, which it is necessary to explain at some length to you.

The first concerns *the mode in which they are to be proved*. And it results from an inflexible rule of the law of evidence, that, when a contract is reduced into writing, it shall be proved by the writing, and by that only; and that no *contemporaneous* verbal expressions shall be engrafted upon it for the purpose of altering, adding to, or taking away from its import. You will find this principle laid down and enlarged upon in all the treatises on Evidence (see, for instance, Starkie on Evid. 4th ed. 648); where you will find the application of this rule very largely discussed. Indeed, there is hardly any one branch of the law which has given rise to so much subtle and anxious discussion and inquiry as this single rule of the law of Evidence. The late Vice-Chancellor, Sir James Wigram, has, in one of the ablest treatises existing in our law libraries, discussed its application to the single head of Devises.

In applying this rule, therefore, you must take care not to be misled as to its meaning; for as I have just [*28] said, its consideration involves very subtle *and nice distinctions. It would be impossible to do complete justice to these in the course of a lecture; still, however, I think that I can point out their nature, so far as to give you a notion of the sort of questions which are likely to arise, sufficient to prevent you from being taken by surprise by such questions, should they occur to you in practice.

Now, the rule itself, as I have said, is, that no *parol*, that is *verbal*, evidence of what took place at the time of making a written contract(A) is admissible for the

(A) These rules of course apply exclusively to written and not parol

purpose of *contradicting* or *altering* it; for instance, if *A.* contract in writing with *B.* to deliver him 100 quarters of wheat within three months, at so much per quarter, no evidence would be admissible to show that the wheat was agreed, at the time, to be delivered only in case of the arrival of a ship which the vendor expected from Odessa with wheat on board; for that would be, by verbal evidence, to turn an absolute written contract into a conditional one. So, if a promissory note (which, not being under seal, is, you must be aware, a simple contract), were made payable on one day, verbal evidence could not be admitted to show that it was meant to be payable upon another. (a) [And as verbal evidence of what took place at the time of making cannot be given to show that the meaning of the written contract is different from [*29] what *its words import, so neither can evidence that the parties have acted upon the supposition of its being different have that effect. (b)]¹

(a) *Free v. Hawkins*, 8 Taunt. 92; *Hoare v. Graham*, 3 Camp. 57; *Hogg v. Snaith*, 1 Taunt. 347.

(b) *Giraud v. Richmond*, 15 L. J. (C. P.) 180; 2 C. B. 835, E. C. L. R. vol. 52, S. C.

contracts. An illustration of this occurred in the case of an auctioneer, who, at the time of a sale, verbally declared a variation from the printed catalogue; namely, that goods stated therein to be silver were only plated, and so sold them; the actual contract being a parol one, evidence of the parol statement was held admissible to explain it: *Eden v. Blake*, 13 M. & W. 614; but if the auctioneer had signed an agreement which referred to or formed part of the unaltered catalogue, then his parol declaration of the alteration could not be given in evidence, as it would vary a written contract. *Shelton v. Livius*, 2 Cr. & J. 411.

¹ A vast number of authorities upon this much-discussed rule of evidence will be found in the digests and elementary treatises, among which may be particularly noticed the notes of Messrs. Cowen and Hill, to the American edition of Phillips on Evidence, and the fifteenth

But, though you are not allowed to show that the meaning of a written contract was varied by words *at*

chapter of Professor Greenleaf's treatise on that subject. A few only of the instances of the application or non-application of the rule can be noticed here. It has been enforced in the *exclusion* of evidence to show that a signature in one's own name was intended to be merely as agent: *Stackpole v. Arnold*, 11 Mass. 27; *Hancock v. Fairfield*, 30 Maine, 299; that a written agreement to deliver wheat to A. was modified by a parol direction to deliver it to B.: *Wolfe v. Myers*, 3 Sandford's S. C. 7; *Babcock v. May*, 4 Hammond, 334; that a written agreement for the purchase of land, whereby the purchaser was not to cut timber, was varied by a parol license to cut it: *Pierepont v. Barnard*, 5 Barbour's S. C. R. 364; that a check purporting to be for so much money was designed to be payable in the notes of a certain bank: *Pack v. Thomas*, 13 Smedes and Marsh. 11; or on a contingency: *Mosely v. Hanford*, 10 Barn. and Cress. 729; *Cunningham v. Wardwell*, 3 Fairfield, 466; *Erwin v. Sanders*, 1 Cowen, 249; that a particular ship was verbally excepted from a policy of insurance on the fleet to which she belonged: *Weston v. Emes*, 1 Taunton, 115; that goods to be stowed under deck were verbally allowed to be stowed on deck: *Creery v. Holly*, 14 Wendell, 26 (it would have been different had the evidence been to prove a *custom* of storage in that manner: *Baxter v. Leland*, 1 Blatchford, 526; see *infra*, note to page 30). The rule, however, does not exclude the testimony of *experts* to aid in the reading of the instrument, or to explain a local or technical meaning: *Wigram on Wills*, 48; *Sheldon v. Benham*, 4 Hill, 129; *Smith v. Wilson*, 3 Barn. & Adolph. 728, 23 E. C. L. R.; *Clayton v. Gregson*, 5 Ad. & Ell. 302, 31 E. C. L. R.; *The King v. Washiter*, 6 Id. 153, 33 E. C. L. R.; *Piesch v. Dixon*, 1 Mason, 11; unless, indeed, the words have a known legal meaning. *Firth v. Barker*, 2 Johns. 335. Nor does it exclude the admission of the contemporaneous *writings* relating to the subject-matter: *Bowenbank v. Monteiro*, 4 Taunton, 846; *Hunt v. Livermore*, 5 Pick. 395; *Bell v. Bruen*, 1 Howard, 169; *Thomas v. Austin*, 4 Barb. S. C. R. 265; nor evidence to show the circumstances surrounding the parties at the time: *Haigh v. Brooks*, 10 Ad. & Ell. 309; *Goldshede v. Swan*, 1 Excheq. 154; *Bainbridge v. Wade*, 1 Eng. Law & Eq. R. 236; *Smith v. Bell*, 6 Peters, 75; *Wooster v. Butler*, 13 Connecticut, 309; *Knight v. New Eng. Worsted Co.* 2 Cushing, 271-283; *Lowrie v. Adams*, 22 Vermont, 160; for all this, it is said, tends to *explain*, and not to contradict the writing. And it is obvious that evidence is admissible to show that the writing

the time of making it, there are some cases in which you may show that it was subsequently so varied. There

never was of any validity, as by reason of fraud, illegality, duress, incapacity of parties, &c., for those grounds, as has been shown in the preceding chapter, vitiate the contract *ab initio*, and to exclude evidence of this, would be to promote and not to repress injustice.

But upon the ground that parol evidence is admissible to explain in cases of *fraud*, the courts of Pennsylvania have gone very far, and have in effect taken the position that when the written contract has been entered into with the understanding that it is to be used in a particular way, or with a particular qualification, it is a fraud to violate this understanding. And hence many cases have sanctioned the admission of evidence to show what was the understanding at the time the contract was made. "If the rule is," it was said, in *Bollinger v. Eckert*, 16 Serg. & Rawle, 424, "that parol evidence is admissible to correct mistake or fraud, and if the real contract of the parties is not expressed in the writing, this must arise from mistake or fraud. We seem now to have settled down in this; whatever material to the contract was expressed and agreed to when the bargain was concluded and the article drawing, may, if not expressed in the article, be proved by parol." "Ever since the case of *Hurst v. Kirkbride*, cited 1 Binney, 616," as was said in *Oliver v. Oliver*, 4 Rawle, 141, "it has been the practice to receive parol evidence of what passed at the time of the execution of deeds, or at and before the execution. When the fairness of the transaction is impeached, it is immaterial whether the party intended a fraud at the time of the contract, or whether the fraud consists in the fraudulent use of the instrument. *Hulse v. Wright*, 16 Serg. & Rawle, 345; *Lyn v. Huntingdon Bank*, 14 Id. 283; *Thomson v. White*, 1 Dallas, 424, are of this description;" and many other cases have, while regretting the extent of the innovation, followed it: *Partridge v. Clark*, 4 Barr, 166; *Renshaw v. Gans*, 7 Id. 119; *Remick v. Swinehart*, 1 Jones, 238. But in the most recent case on the subject, *Remick's Executors v. Remick*, 3 Harris, 66, the Court evinced the strongest disposition to sanction the admission only of *contemporaneous* evidence, and to apply the strict rule in the exclusion of parol statements occurring *previously* to the transaction. "In the somewhat unsteady course of decision upon this vexed point of evidence," said Bell, J., who delivered the opinion of the Court, "if any principle has been adhered to with tenacity, it is, that oral proof to vary or affect a written instrument must be confined to what occurred at the execution of it. *Bollinger v. Eckert*, 16 Serg. & Rawle,

are cases in which the contract is of a description which is not required by law to be reduced into writing at

24; *Stine v. Sherk*, 1 Watts & Ser. 195. Even thus restricted, it is acknowledged to be full of danger. Were the door opened still wider or the admission of all the loose dicta of the parties, running, it might be, as in this instance, through a long course of years, the flood of evil would become so great as to sweep before it every barrier of confidence and safety, which human forethought, springing from experience, is so sedulous to raise against the treachery of memory and the falsehood of men. To avoid, therefore, what would really be a social calamity, it is recognized as a settled maxim, that oral evidence of an agreement or understanding between parties to a deed or other written instrument, entertained before its execution, shall not be heard to vary or materially affect it. *Cozens v. Stevenson*, 5 Ser. & Rawle, 421; *Hilpin v. Consequa*, 1 Peter's C. C. Rep. 85; S. C. 3 Wash. C. C. Rep.; *M'Kenna v. Henderson*, 1 Pa. Rep. 417. Accordingly, the settled rule is, that when a contract has been reduced to writing, it is understood as expressing the final conclusions of the contracting parties, and fully accepted as merging all prior negotiations and understandings, whether agreeing or inconsistent with it. *Lighty v. Shorb*, 3 Pa. Rep. 450; *Monongahela Nav. Co. v. Fenlon*, 4 Watts & Ser. 207, 109. If any dicta or even decision in hostility to this axiom are to be found, they must be ascribed to the strong desire we are all apt to be wayed by, to defeat some strongly suspected fraud in the particular case. But these occasional aberrations but lead to the more emphatic reannunciation of a principle found to be essential to the maintenance of that certainty in human dealings, without which commerce must degenerate into chicanery, and trade become but another name for rick."

The line of decision taken in Pennsylvania admitting such evidence on the ground of fraud has not, it is believed, been generally observed elsewhere, and in a note to *Woolam v. Hearn*, 2 White's Equity Cases, 561, Am. Ed., the student will find the authorities collected and commented on.—R.

When a contract to do certain work is put in writing, and no time fixed for the completion of the work, or the payment of the same, the inference of law is, that the work is to be paid for when the labor is done: and an action for labor and service cannot be sustained therefor, until the work is completed or the contract in some legal way terminated. Parol evidence, showing a verbal agreement as to the time of payment, made when the contract was signed, cannot be admitted.

all : thus if, in consideration of 50*l.*, I promise to go to York on the 1st day of January, and that contract be reduced to writing, verbal evidence would not be admissible to show that it was agreed, *at the same time*, that the contractee was to be at liberty, on payment of 10*l.*, to substitute Edinburgh for York ; but verbal evidence *would* be admissible to show that it was next day agreed, that, on payment of 10*l.*, he might, if he pleased, substitute Edinburgh for York ; for, as there is no rule of law which requires such a contract to be reduced into writing, we might have made it by mere words, and are therefore allowed to give verbal evidence—not that the written contract did not contain the intention of the parties at the time of drawing it up—but that they *subsequently* altered a part of it by words, and so, in fact, made a *new agreement*.¹ But, though this may be done where the contract is one which the law does not *require to be in writing, [*30] yet, where a writing is necessary, it cannot be allowed ; for, if it were, the effect of the verbal evidence would be to turn a contract which the law requires to be in writing into one partly in writing and partly in words. Therefore, in *Goss v. Lord Nugent*,^(c) it was

(c) 5 B. Ad. 56 ; E. C. L. R. vol. 27.

Thompson v. Phelan, 2 Foster, 339. See, to the same effect, *Whitney v. Lowell*, 33 Maine, 318 ; *Conant v. Dewey*, 1 Foster, 353 ; *Railsbuck v. Turnpike Co.* 2 Carter, 656 ; *Norton v. Coons*, 2 Selden, 33. A mere receipt for money, or other things, it has always been held, may be explained or contradicted by parol. *O'Brien v. Gilchrist*, 34 Maine, 554 ; *Edgerly v. Emerson*, 3 Foster, 555 ; *Wadsworth v. Allcot*, 2 Selden, 64 ; *Deluach v. Turner*, 6 Richardson, 117 ; *Weatherford v. Farrar*, 18 Missouri, 474.

¹ *Jeffrey v. Walter*, 1 Starkie, 267 ; *Wright v. Crooks*, 1 Scott's N. S. 685 ; *Cummings v. Arnold*, 3 Metcalf, 486 ; *Robinson v. Bachelder*, 4 New Hamp. 40 ; *Keating v. Price*, 1 Johns. Cas. 22 ; *Dearborn v. Cross*, 7 Cowen, 50 ; *Frost v. Everett*, 5 Cowen, 497 ; *Yonqua v. Nixon*, 1 Peters C. C. R. 221 ; *Boyd v. Bertrand*, 2 English, 321.

decided that a contract for the purchase of land (which, by the Statute of Frauds, is required to be written) cannot be altered by a subsequent verbal arrangement. "Such an agreement (*i. e.* the supposed alteration) must," said the Lord Chancellor (in *Emmet v. Dewhirst*), "be proved; it cannot be proved by parol, therefore it cannot be proved at all." (d) (A)¹

Another celebrated distinction on this subject is, that in a written contract, or, indeed, in any other written instrument, if there be a *patent ambiguity*, it never is allowed to be explained by verbal evidence, although a *latent ambiguity* is so. The meaning of the expressions *patent* and *latent* with reference to this subject is as follows:—

A *patent ambiguity* is one which appears on the face of the instrument itself, and renders it ambiguous and unintelligible, as if in a will there were a *blank* left for the devisee's name.

A *latent ambiguity* is where the instrument itself is on the face of it intelligible enough, but a *diffi-
 [*31] culty arises in ascertaining the identity of the subject-matter to which it applies, as if a devise were to *John Smith*, without further description. In that case the devise would be intelligible enough on the face of it, and if there were only one John Smith in being no difficulty could arise. But as there are seve-

(d) *Emmet v. Dewhirst*, 21 L. J. (Ch.) 497; *Marshall v. Lynn*, 6 M. & W. 109.*

(A) Both acts and words are inadmissible to vary a written contract, though the parties have acted on the verbal alteration for some years. *Giraud v. Richmond*, 15 Law Jour. C. P. 180.

¹ The same point was decided, on the authority of *Goss v. Lord Nugent*, in the late case of *Marshall v. Lynn*, 6 Mees. & Welsby, 109, with respect to a contract for the sale of goods falling within the operation of the same statute. So in *Blood v. Goodrich*, 9 Wendell, 38.—R.

ral thousands, it would be impossible to tell which of them was meant without admitting verbal evidence, which would accordingly be admitted. This would be what is called a latent ambiguity, because it would not appear on the face of the instrument, but would lie hid till evidence had been produced showing that there were a great number of persons corresponding in name with the devisee.

[The force and application of this rule, and the distinction between these two kinds of ambiguity, are so happily expressed and illustrated in a judgment of the Court of Exchequer,^(e) that, although that judgment was given on the case of a will, it will be very useful to introduce a portion of it here: "The object in all cases," said the Court, "is to discover the intention of the testator. The first and most obvious mode of doing this is, to read his will as he has written it, and collect his intention from his words. But, as his words refer to facts and circumstances respecting his property and his family, *and others whom he named or described in his will, it is evident that the meaning [*32] and application of his words cannot be ascertained without evidence of all those facts and circumstances. To understand the meaning of any writer, we must first be apprised of the persons and circumstances that are the subjects of his allusions or statements; and if these are not fully disclosed in his work, we must look for illustrations to the history of the times in which he wrote, and to the works of contemporaneous authors. All the facts and circumstances therefore respecting persons or property to which the will relates, are undoubtedly legitimate and often necessary evidence, to enable us to understand the meaning and application of his words.

(e) Doe d. Hiscocks v. Hiscocks, 5 M. & W. 363.* See Doe d. Allen v. Allen, 12 A. & E. 451, E. C. L. R. vol. 40; Doe d. Gains v. Rouse, 5 C. B. 422, E. C. L. R. vol. 57.

Again, the testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will, they could only be explained and construed by the aid of evidence, to show the sense in which he used them, in like manner as if his will were written in cipher or in a foreign language. The habits of the testator in these particulars must be receivable as evidence, to explain the meaning of his will. But there is another mode of obtaining the intention of the testator, which is, by evidence of his declarations, of the instructions given for his will, and other circumstances of the like nature, which are not adduced for explaining the words or meaning of his *will, but either to

[*33] supply some deficiency, or remove some obscurity, or to give some effect to expressions that are unmeaning or ambiguous. Now, there is but one case in which it appears to us that this sort of evidence of intention can properly be admitted, and that is where the meaning of the testator's words is neither ambiguous nor obscure, and where the devise is on the face of it perfect and intelligible, but, from some of the circumstances admitted in proof, an ambiguity arises as to which of the two or more things, or which of the two or more persons (each answering the words in his will), the testator intended to express. Thus, if a testator devise his manor of S. to A. B., and has two manors, of North S. and South S., it being clear he means to devise one only, whereas both are equally denoted by the words he has used; in that case there is what Lord Bacon calls 'an equivocation,' the words equally apply to either manor; and evidence of previous intention may be received to solve this latent ambiguity, for the intention shows what he meant to do; and when you know that, you immediately perceive that he has done it by

the general words he has used, which, in their ordinary sense, may properly bear that construction. It appears to us, that, in all other cases, parol evidence of what was the testator's intention ought to be excluded, upon this plain ground, that his will ought to be made in writing; and if his intention cannot be made to *appear by the writing explained by circum- [*34] stances, there is no will.]

There is one exception, indeed, engrafted on the rule which forbids the reception of evidence for the purpose of qualifying the sense of a written contract; it occurs where parties have contracted with reference to some known and established usage. In such cases the usage is sometimes allowed to be engrafted on the contract, in addition to the express written terms: for examples of this you may refer to *Wigglesworth v. Dallison*, (g) *Udhe v. Walters*, (h) *Powell v. Horton*, (i) and the Judgment of Baron Parke in *Hutton v. Warren*. (j)¹ Yet,

(g) Dougl. 201.

(h) 3 Camp. 16.

(i) 2 Bing. N. C. 668, E. C. L. R. vol. 29.

(j) 1 M. & W. 474.*

¹ Thus, in *Coit v. Ins. Co.* 7 Johns. 385, evidence was admitted to show that by general understanding, the word "*roots*," in New York policies of insurance, was limited to roots perishable in their own nature, and therefore excluded *sarsaparilla*; and in *Astor v. Ins. Co.* 7 Cowen, 202, the usage of traders in *furs* and *skins* was admitted to show the meaning of those words in a policy; and other instances in which usage was similarly permitted, by way of explanation, will be found in *Taylor v. Briggs*, 2 Car. & Payne, 525; *Smith v. Wilson*, 3 Barn. & Adolph. 728; *Baker v. Ludlow*, 2 Johns. Cases, 289; *Macy v. Ins. Co.* 9 Metcalf, 362; *Putnam v. Tillotson*, 13 Id. 517; *Eyre v. Ins. Co.* 5 Watts & Serg. 116; *Allegre v. Ins. Co.* 6 Harris & Johnson, 408; *Allegre's Adm'rs v. Maryland Ins. Co.* 2 Gill & Johns. 136. So, in a late case, where a vessel was libelled for freight of flour, the respondents proved that it had been damaged by being stowed in the hold, on the top of moist sugar, and the libellants were permitted to show an established custom of

even in these cases, the Courts never admit evidence of a *usage* inconsistent with the written contract; for

storage in general ships from New Orleans to the northern ports—"it being, of course, well understood by the respondents that their flour would be thus shipped, unless they gave instructions to the contrary they must be deemed to have assented to the mode of shipment." *Baxter v. Leland*, 1 Blatchford, 526. Evidence of a usage is not, however, admissible when the meaning is certain, and not doubtful: *Gross v. Criss*, 3 Grattan, 262; *Macomber v. Parker*, 13 Pick. 176; *Brown v. Brown*, 8 Metcalf, 577; *Sleght v. Rhineland*, 1 Johnson, 92, reversed on another point in 2 Id. 531; nor where it will contradict the written contract, as where a policy was made in the usual form upon the ship, her tackle, apparel, boats, &c., evidence of usage that the underwriters never pay for the loss of boats slung on the quarter was held inadmissible: *Blackett v. Insurance Co.* 2 Crompton & Jervis, 244; and to the same effect are *Sch. Reeside*, 2 Sumner, 568; *Turney v. Wilson*, 7 Yerger, 340; *Allen v. Dykers*, 3 Hill (N. Y.) 593; *Hinton v. Locke*, 5 Id. 437. And it has also been said that a usage will not be recognized in a court of law unless it be reasonable, and adopted to increase trade and promote fair dealing between the parties. *Marcy v. Ins. Co.* 9 Metcalf, 363; *Bowen v. Stoddard*, 10 Id. 381. The student will find the cases upon this subject collected, and the distinctions carefully noticed, in the American note to *Wigglesworth v. Dallison*, 1 Smith's Leading Cases, 588. The later cases show a disposition rather to restrain than to enlarge the introduction of such evidence: *Donnell v. Columbia Ins. Co.* 2 Sumner, 377; and under any circumstances it is said that a usage must not be proved by isolated instances, but be so certain, uniform, and notorious that it must probably have been understood by the parties as entering into the contract. *Cope v. Dodd*, 1 Harris (Pa.) 33; *Nichols v. De Wolf*, 1 Rhode Island, 277.—R.

When the terms of a contract are clear, evidence of usage is inadmissible to vary its effect. *George v. Bartlett*, 2 Foster, 496; *Catlin v. Smith*, 24 Vermont, 85; *Wadsworth v. Allcott*, 2 Selden, 64. In the absence of clear stipulations in contracts, usage of trade or business is admissible to show the intention of the parties. *Leach v. Beardslee*, 22 Connecticut, 404; *Dixon v. Dunham*, 14 Illinois, 324. If it be shown or may be fairly presumed that the parties to a contract, entered into it in reference to a custom existing in the city where they did business, and where they contracted, the general law must give way to the custom. *Fulton Ins. Co. v. Milner*, 23 Alabama,

“usage” (says Lord Lyndhurst, in *Blackett v. R. E. Insurance Co.*)(*k*) may be admissible “to *explain* what is doubtful, but is never admissible to contradict what is plain.”(*l*) In the words of Mr. Baron Alderson, in the subsequent case of *Clarke v. Royston*,(*m*) “Where a stipulation is inconsistent with the custom of the country, the contract must prevail and the custom of the country must be excluded.” In these cases it *appears to be simply a question whether the [**35*] words of the contract themselves sufficiently disclose the full import of the contract : if so no custom can vary it, and no evidence of custom is admissible.(*n*)

[Subject to this rule, parol evidence is admissible to annex customary incidents to written contracts, on matters with respect to which they are silent,—in contracts between landlord and tenant, in commercial contracts, and in contracts in other transactions of life in which known usages have been established. In all such cases the notoriety of the usage makes the incidents virtually part of the contract. Thus, a tenant may avail himself of a local custom to take an away-going crop after the expiration of his term under a lease; for the custom did not alter or contradict the

(*k*) 2 C. & J. 244.*

(*l*) See also *Yeates v. Pym*, 6 Taunt. 445, E. C. L. R. vol. 1; *Roberts v. Barker*, 1 Cr. & M. 808; and the note to *Wigglesworth v. Dallison*, 1 Smith L. C. 300. (*m*) 13 M. & W. 757.*

(*n*) See *Ford v. Yates*, 2 M. & Gr. 549, E. C. L. R. vol. 40. *Charlton v. Gibson*, 1 Car. & K. 541, E. C. L. R. vol. 47; per Cresswell, J.; *Hewson v. Cooper*, 3 Scott, N. R. 48; *Clifford v. Turrell*, 6 Jur. 5 & 921 (V. C. Bruce).

420; *Soutier v. Kellerman*, 18 Missouri, 509. The custom must be of such extent, universality and antiquity as to warrant the conclusion that it was known to the contracting parties, and that they made their contract with reference to it. *Dixon v. Dunham*, 14 Illinois, 324; *Adams v. Otterback*, 15 Howard, S. C. 539.

terms of the lease, but merely superadded a right consequential to the taking in the part of the country where the farm is situated. (o) Thus, a person employing a broker on the Stock Exchange impliedly gives him power to act in accordance with the rules there established, although he makes no mention of them in his instructions, and although he may even [*36] be ignorant of them. (p) And thus an agreement, in writing, to serve from 11th November, 1815, to 11th November, 1817, at certain wages, in which the servants engage to lose no time on our account, to do our work well, and behave ourselves in every respect as good servants, was considered consistent with a usage in the particular trade for servants, under similar contracts, to have certain holidays and Sundays to themselves. (q)

Moreover, where terms are used, which are known and understood by a particular class of persons in a certain special and peculiar sense, evidence to that effect is admissible for the purpose of applying the instrument to its proper subject-matter; and the case seems to fall within the same consideration as if the parties, in framing their contracts, had made use of a foreign language, which the Courts are not bound to understand. Thus where, by a charterparty, a vessel with a cargo of coals to Algiers was to be unloaded at a certain rate per day, and if detained longer the charterer was to pay so much per day from the time of

(o) *Wigglesworth v. Dallison*, Dougl. 201. See *Holding v. Piggott*, 7 Bing. 465, E. C. L. R. vol. 20.

(p) *Sutton v. Tatham*, 10 A. & E. 27, E. C. L. R. vol. 37. See *Bayliffe v. Butterworth*, 1 Exch. 416; **Stewart v. Cauty*, 8 M. & W. 160; **Syars v. Jonas*, 2 Exch. 141.*

(q) *R. v. Stockton-upon-Trent*, 5 Q. B. 303, E. C. L. R. vol. 48. See *Grant v. Maddox*, 15 M. & W. 737; **Evans v. Pratt*, 3 M. & Gr. 759, E. C. L. R. vol. 42.

the vessel being ready to unload and *in turn to deliver*, evidence was admitted to show, that, in the port *of Algiers, these words had acquired a peculiar meaning.^(r) And parol evidence has been received to show the meaning of the word “level” in a lease of coal mines;^(s) that the word London has a colloquial sense other than the City;^(t) and that, by the usage of a particular district, 1000, applied in a lease to rabbits on the land, meant 1200.^(u) [*37]

The other point to which I alluded, as constituting an important practical distinction between Simple Contracts by mere words and by writing, is, that there are several matters, which, although they are capable of becoming the subjects of *Simple Contract*, cannot, nevertheless, be contracted for without *writing*, so as to give either party a right of action on such contract.

By far the most important class of contracts subject to this observation are those falling within the enactments of the *Statute of Frauds*. And these are of such very constant recurrence in practice that it will be right to devote some time to their consideration.

The Statute of Frauds, as it is called, was passed in the twenty-ninth year of the reign of Charles II, and is the 3d cap. of the statute-book of that year. [*38]
*It is said to have been the joint production of Sir Matthew Hale, Lord Keeper Guilford, and Sir Leone Jenkins, an eminent civilian. The great Lord Nottingham used to say of it “*that every line was worth a*

(r) *Robertson v. Jackson*, 2 C. B. 412, E. C. L. R. vol. 52. See *Liedeman v. Schultz*, 23 L. J. (C. P.) 17.

(s) *Clayton v. Gregson*, 5 A. & E. 302, E. C. L. R. vol. 31.

(t) *Mallan v. May*, 13 M. & W. 511.*

(u) *Smith v. Wilson*, 3 B. & Ad. 728, E. C. L. R. vol. 23.

subsidy ;”¹ and it might now be said with truth that every line has *cost* a subsidy, for it is universally admitted that no enactment of any legislature ever became the subject of so much litigation. Every line, and almost every word of it, has been the subject of anxious discussion, resulting from the circumstance that the matters which its provisions regulate are those which are of every-day occurrence in the course of our transactions with one another.

The chief object of passing the statute was to prevent the facility to frauds, and the temptation to perjury, held out by the enforcement of obligations depending for their evidence upon the unassisted memory of witnesses. How great this temptation and facility were is obvious; and, accordingly, the statute, in the 1st section, declares its own enactment to be “for the prevention of many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury;” and then it goes on to provide for various cases, in which it was apprehended that such practices were likely to occur; thus, the 1st of the twenty-five sections of which it consists is levelled at parol conveyances of land, and

¹ But in Lord Nottingham’s MS. report of the case of *Ash v. Abdy* (1678), printed in 3 Swanst. 644, he remarks: “And I said that I had some reason to know the meaning of this law, for it had its first rise from me, who brought the bill into the Lords’ House, though it afterwards received some additions and improvements from the judges and civilians.” In *Gilbert’s Reports* in Eq. 171, “Sir Matthew Hale and Sir Lionel Jenkins, who prepared this statute,” are referred to, but Lord Mansfield, in *Windham v. Chetwynd*, 1 Burr. 418, doubted Lord Hale’s authorship of the statute, as “it was not passed till after his death, and was brought in, in the common way, and not upon any reference to the judges;” and Lord Campbell, in his *Lives of the Chancellors*, refers to the statute as deserving more praise for its general design, than for the manner in which it was executed; vol. 3, p. 418.—R.

contains the celebrated enactment, of which you have doubtless *often heard, that they shall create [*39] estates at will only, except in the case of leases not exceeding three years, and reserving two-thirds of the annual value as rent, which are excepted by the 2d section.¹

The 3d section is levelled at *parol* assignments, grants, or surrenders; the 5th, at unattested devises; the 6th, at secret revocations of devises; the 7th, at *parol* declarations of trust; the 19th and 20th against *nuncupative* wills of personalty; and the 21st against verbal alterations in written wills.

But the two sections which mainly affect *contracts*, and which, consequently, are chiefly important to the subject of this lecture, are the 4th and 17th.

The 4th section enacts—"That *no action* shall be brought to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be

¹ It may be remarked, that it has been held in Pennsylvania and North Carolina, that these provisions of the Statute of Frauds do not, in those States, apply to trust estates, but that *parol* evidence is admissible to show that a conveyance, absolute on its face, is in fact a trust for another: *Murphy v. Hubert*, 7 Barr, 420; *Wetherill v. Hamilton*, 3 Harris, 198; *Freeman v. Freeman*, 2 Parsons' Eq. Ca. 81; *Blackwell v. Ovenby*, 6 Iredell's Eq. 38; though it has been also said that the evidence to this effect should be entirely free from doubt. *Tritt v. Crotzer*, 1 Harris, 451.—R.

brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be *charged [*40] therewith, or some other person thereunto by him lawfully authorized."

The contracts provided for by this section are, therefore, as you will have observed—

1st. *Promises* by an *executor* or *administrator* to answer damages out of his own estate.

2d. Promises to answer for the *debt, default, or miscarriage of another person*.

3d. Agreements made in consideration of *marriage*.

4th. Contracts or *sales of land*, tenements, or hereditaments, or any interest in or concerning them.

5th. Agreements *not to be performed within the space of a year* after the making thereof.

The latter part of the section applies equally to each of these five sorts of contract, which are equally prohibited from being made the subject-matter of action, unless the *agreement* or some note or *memorandum* of it shall be in writing, signed by the party to be charged or some person thereunto by him lawfully authorized.

Now it has been decided,—and the decision you will observe is equally applicable to each of the five descriptions of contract,—that in consequence of the introduction of the word "*agreement*," the *consideration* as well as the *promise* must appear in writing. That was settled by the well-known cases of *Wain v. Warlters*, (x)

[41*] *Saunders v. *Wakefield*, (y) and *Jenkins v. Reynolds*. (z) For, the word *agreement*, comprehending what is to be done on both sides, comprehends of course the *consideration* for the promise as well as the *promise* itself. The judgment of Lord Ellenborough in

(x) 5 East, 10. (y) 4 B. & Ald. 595, E. C. L. R. vol. 6.

(z) 3 B. & B. 14, E. C. L. R. vol. 7. See *Price v. Richardson*, 15 M. & W. 539; **Sykes v. Dixon*, 9 A. & E. 693, E. C. L. R. vol. 36.

Wain v. Warlters very clearly explains the reasons upon which this doctrine is founded.

“The clause in question in the Statute of Frauds,” says his Lordship, “has the word *agreement* (*‘unless the agreement upon which the action is brought, or some memorandum or note thereof, shall be in writing,’ &c.*) ; and the question is, Whether that word is to be understood in the loose incorrect sense in which it may sometimes be used, as synonymous to promise or undertaking, or in its more proper and correct sense, as signifying a mutual contract, on consideration between two or more parties? The latter appears to me to be the legal construction of the word, to which we are bound to give its proper effect : more so when it is considered by whom that statute is said to have been drawn, by Lord Hale, one of the greatest judges who ever sat in Westminster Hall, who was as competent to express as he was able to conceive the provisions best calculated for carrying into effect the purposes of that law. The person to be charged for the debt of another is to be *charged in the form of the proceeding against him, *upon his special promise* ; but, without a legal *consideration* to sustain it, that promise would be *nudum pactum* as to him. The statute never meant to enforce any promise which was before invalid, merely because it was put in writing. The obligatory part is indeed the promise, which will account for the word promise being used in the first part of the clause ; but still in order to charge the party making it, the statute proceeds to require that the *agreement* (by which must be understood the *agreement* in respect of which the promise was made), must be reduced into writing. And indeed it seems necessary for effectuating the object of the statute, that the consideration should be set down in writing

[*42]

as well as the promise ; for, otherwise, the consideration might be illegal, or the promise might have been made upon a condition precedent, which the party charged may not afterwards be able to prove, the omission of which would materially vary the promise, by turning that into an absolute promise which was only a conditional one ; and then it would rest altogether on the conscience of the witness to assign another consideration in the one case, or to drop the condition in the other, and thus to introduce the very frauds and perjuries which it was the object of the Act to exclude, by requiring that the *agreement* should be reduced into writing, by which the consideration as well as the promise would be rendered certain."

¹ Although *Wain v. Warlters* has been sometimes doubted in England (*Ex parte Minet*, 14 Ves. 190, *Ex parte Gardom*, 15 Id. 286), yet its authority has long been there considered as unquestioned. *Saunders v. Wakefield* ; *Jenkins v. Reynolds*, *supra* ; *Morley v. Brothby*, 3 Bingham, 107 ; *Newbury v. Armstrong*, 6 Id. 201 ; *Raikes v. Todd*, 8 Adolph. & Ellis, 448 ; *Semple v. Pink*, 1 Exchequer, 74 ; *Price v. Richardson*, 15 Mees. & Welsby, 539 ; *Bewley v. Whitford*, 1 Hayes (Irish Exch.), 356. In this country its authority has been acknowledged in New Hampshire, New York, Maryland, Georgia, and perhaps New Jersey : *Neelson v. Sandborne*, 2 New Hampshire, 414 ; *Sears v. Brink*, 3 Johns. 210 ; *Elliot v. Geisse*, 7 Harris & Johnson, 457 ; *Wyman v. Gray*, Id. 409 ; *Henderson v. Johnson*, 6 Georg. 390 ; *Buckley v. Beardslee*, 2 Southard, 570 (though see *Lea v. Lea*, Spencer, 337) ; but in most of the States (in some of which the word *promise* is substituted for or introduced with the word *agreement*, see *Taylor v. Ross* ; *Violet v. Patten*, *infra*) it is held, in opposition to *Wain v. Warlters*, that the consideration need not appear from the instrument, but may be shown by parol : *Packard v. Richardson*, 17 Mass. 122, where is an elaborate opinion by Parker, Ch. J. ; *Bean v. Burbank*, 16 Maine, 460 ; *Cummings v. Dennett*, 26 Id. 397 ; *Gillighan v. Boardman*, 29 Id. 79 ; *Sage v. Wilcox*, 6 Connecticut, 81 ; *Smith v. Ide*, 3 Vermont, 290 ; *Fyler v. Givens*, *Ryley's Law Cases* (S. C.), 56 (in effect overruling *Stevens v. Winn*, 2 Nott

*[But this consideration need not appear in express terms; it is sufficient, as will hereafter appear, that any person of ordinary capacity must infer from the perusal of the note that such and no other was the consideration upon which the under- [*43]

& M'Cord, 372, note *a*); Reed v. Evan, 17 Ohio, 128; Pearce v. Wren, 4 Smedes & Marshall, 91; Taylor v. Ross, 3 Yerger, 330; Violet v. Patten, 5 Cranch, 142. The Revised Statutes of New York, in re-enacting the fourth section of the Statute of Frauds, altered it by requiring that the agreement should itself express the consideration, and this was at first held to require that the consideration should be expressed in terms, and not by implication, in the instrument itself, and without aid from reference to any other. Smith v. Ives, 15 Wendell, 182; Packer v. Wilson, Id. 343; Newcomb v. Clark, 1 Denio, 226; Bennett v. Pratt, 4 Id. 275. But later cases have relaxed this rigidity of construction, and it seems now settled that it is sufficient if the consideration, expressed with reasonable certainty, appear in writing in any form. Staats v. Howlett, 4 Denio, 359; Union Bank v. Costen, 3 Comstock, 203. The fourth section of the Statute of Frauds never was re-enacted in Pennsylvania. Wain v. Warlters forms one of the Leading Cases compiled by Mr. Smith, and the student may be profitably referred to the notes both of himself and of the American editor upon it. 2 Lead. Cas. 245. It should be noted, that although the authority of Wain v. Warlters requires that the consideration should appear in writing, yet it is not necessary that the declaration should set forth every circumstance sufficient to take the case out of the statute; for the consideration might, for example, appear from the tenor and result of a long train of correspondence, the inference of which should be for the jury, and if these letters were necessarily to be set forth, and the inference to be deduced by the pleader, great difficulties would be imposed on plaintiffs who had to make out a case not within the statute, if an omission of any one circumstance necessary to take it out of the statute might be pleaded in bar. Lilly v. Hewitt, 11 Price, 501; Etting v. Vanderlyn, 4 Johns. 237, and see *infra*, note (*b*) to p. 40.—R.

The 4th sect. of the Statute of Frauds has been, in part, re-enacted in Pennsylvania since the above note was written. Act 26 April, 1855. Promises by executors or administrators to be answerable from their own estates, and undertakings for the debt of third persons are required to be in writing. Act 22d April, 1856, as to contracts for the sale of realty.

taking was given. (a) It must appear in express terms, or by necessary implication. (b)

The same reasoning as that employed by Lord Ellenborough in *Wain v. Warlters* clearly shows that all the terms of the agreement, as well as the consideration, must be expressed in the memorandum. (c)]

There is another observation applicable to all the five cases provided for by this section of the statute, namely, that the *agreement*, the meaning of which word I have just explained, need not be contained in a single writing, but may be collected from several. You will find that established by *Jackson v. Lowe*, (d) *Phillimore v. Barry*, (e) *Dobell v. Hutchinson*, (f) and other cases. But though, where there are several papers, the agreement may be collected from them all, provided they are sufficiently connected in sense among [*44] themselves, so *that a person looking at them all together can make out the connection and the meaning of the whole without the aid of any verbal evidence; yet it is otherwise when such connection does not appear on the face of the writings themselves: for, to let in verbal evidence in order to connect them would be to let in the very mischief which it was the object of the framers of the Act to avoid, namely, the uncertainty and temptation to falsehood occasioned by allowing the proof of the contract to depend on the recollection of witnesses: and, therefore, where a written agreement is required by the 4th section of

(a) Per Tindal, C. J., *Hawes v. Armstrong*, 1 Bing. N. C. 765, E. C. L. R. vol. 27.

(b) Per Parke, B., *Jarvis v. Wilkins*, 7 M. & W. 412; **James v. Williams*, 5 B. & Ad. 1109, E. C. L. R. vol. 27.

(c) *Graham v. Musson*, 5 N. C. 603; *Archer v. Baynes*, 20 L. J. (Exch.) 54, 5 Exch. 625, *S. C. This was decided on the 17th section.

(d) 1 Bing. 9, E. C. L. R. vol. 8.

(e) 1 Camp. 513.

(f) 3 A. & E. 355, E. C. L. R. vol. 30.

the statute, it is clear that several writings not bearing an obvious connection *inter se* in sense, cannot be joined together by verbal evidence to make up the agreement. This was one of the points decided in the great case of *Boydell v. Drummond*,^(g) where the plaintiff proposed to publish an edition of Shakspeare with splendid engravings, and issued a prospectus stating the terms. A copy of the prospectus lay in his shop, and beside it lay a book headed "*Shakspeare Subscribers, their Signatures:*" but there was nothing in the book about the prospectus, or in the prospectus about the book. The defendant had signed the book, and, having afterwards refused to continue taking in the Shakspeare, the plaintiff brought an action against him. Now, the Shakspeare was not to be finished for some years, *and therefore the case was one of those provided for by the 4th section of the Statute of Frauds, falling within the words "any agreement that is not to be performed within one year from the making thereof." It was therefore necessary that it should be in writing, and that that writing should be "*signed* by the party to be charged or his agent." Now, the terms of the agreement were in the *prospectus*, and so far the statute had been complied with; but the *signature* unluckily was in the book: and the Court held, that, as the prospectus did not refer to the book, or the book to it, the statute had not been complied with, and the contract could not be enforced. "If," said Le Blanc, J., "there had been anything in that book which had referred to the particular prospectus, that would have been sufficient; if the title to the book had been the same with that of the prospectus, it might perhaps have done: but, as the signature now stands, without reference of any

(g) 11 East, 142.

sort to the prospectus, there was nothing to prevent the plaintiff from substituting any prospectus, and saying that it was the prospectus exhibited in his shop at the time, to which the signature related: the case therefore falls directly within this branch of the Statute of Frauds.”(h)

There is a third point common to all the five contracts mentioned in the 4th section; it is with regard to the signature. The words are, you will recollect, [*46] “*signed by the party to be charged *therewith, or some other person thereunto by him lawfully authorized.*” The signature is to be that of the party *to be charged*; and, therefore, though, as I have pointed out to you, both sides of the agreement must appear in the writing, the consideration as well as the promise, it is not necessary that it should be signed by both the parties; it is sufficient that the party suing on it is able to produce a writing signed by the party whom he is seeking to *charge*.(i)¹ [It matters not whether the signature be placed at the top or elsewhere in the document, so that the intention to sign it be clear.(j) It has also been held, that the written

(h) See *Hammersley v. Baron de Biel*, 12 Cl. & F. 45.

(i) *Laythoarp v. Bryant*, 2 Bing. N. C. 734, E. C. L. R. vol. 29.

(j) *Johnson v. Dodgson*, 2 M. & W. 653; * see *Foster v. Mentor Life Insurance Company*, 23 L. J. (Q. B.) 145.

¹ As it was in *Penniman v. Hartshorne*, 13 Mass. 87; *Hawkins v. Chace*, 19 Pickering, 502; *Balland v. Walker*, 3 Johns. Cases, 60; *Clason v. Bailey*, 14 Johns. 487; *Douglass v. Spears*, 2 Nott & M'Cord, 207; *Anderson v. Harold*, 10 Ohio, 399; *Smith v. Smith*, 8 Blackford, 208. By the New York Revised Statutes the memorandum must be *subscribed*; and it is held, therefore, that a signature elsewhere than at the bottom or end of the writing is insufficient to satisfy the statute as thus varied. *Davis v. Shields*, 26 Wendell, 341.—R.

memorandum must exist before an action be brought upon the contract.(k)]

The last point I shall mention common to all the contracts falling within *this* section regards the consequence of non-compliance with its provisions. This consequence is, not that the unwritten contract shall be void, but *that no action shall be* brought to charge the contracting party by reason of it.(l) And cases may occur, in which the contract may be made available without bringing an action on it; and in which, consequently, it may, though unwritten, be of some avail. Thus, for *instance, if money have been [*47] paid in pursuance of it, that payment is a good one for all purposes; for instance, in *Griffith v. Young*,(m) where 100*l.* was paid by the incoming tenant to the outgoing one, partly for himself, and partly for the landlady, in pursuance of a verbal agreement, the incoming tenant refused to pay the landlady her share, saying that there was no writing, and that words were but wind. The landlady brought her action, and Lord Ellenborough nonsuited her, on the ground that the agreement, being for an interest in land, ought to have been in writing; but the Court of Queen's Bench set aside the nonsuit, with Lord Ellenborough's own concurrence.¹

I have now pointed out to you the matters in which all simple contracts agree, and the practical differences which exist between the effect of *written* and that of

(k) *Bill v. Baiment*, 9 M. & W. 36.*

(l) Per Bosanquet, J., in *Laythoarp v. Bryant*, *supra*. See *In re Hilliard*, 2 D. & L. 919; *Sweet v. Lee*, 3 M. & G. 452, E. C. L. R. vol. 42.

(m) 12 East, 513. See *Cocking v. Ward*, 1 C. B. 858, E. C. L. R. vol. 50.

¹ To the same effect is *Philbrook v. Belknap*, 6 Vermont, 383.—R.

verbal contracts, although in theory both sorts fall within the denomination *Simple Contracts*. I have described the consequences which follow from the rules of evidence upon the reduction of any contract whatever into writing ; and I have begun to describe those consequences which follow from the provisions of the Statute of Frauds, in the cases to which it is applicable. But as it is impossible to finish the consideration of that statute this evening, I shall proceed with it in the next lecture.

*LECTURE III.

[*48]

THE STATUTE OF FRAUDS.—PROMISES BY EXECUTORS AND ADMINISTRATORS. — GUARANTEES. — MARRIAGE CONTRACTS.— CONTRACTS FOR THE SALE OF LAND.—AGREEMENTS NOT TO BE PERFORMED IN A YEAR.

IN the last lecture I began the consideration of those species of contracts, which, according to the 4th section of the Statute of Frauds, must be evidenced by writing.

I touched on the points which equally apply to each of those five species, those namely which regard the appearance in the writing of the consideration and other terms as well as the promise, the *signature* which the statute requires, and the consequences of not reducing into writing contracts which the statute requires should be so evidenced. It remains, before terminating the consideration of that section of the Act, to say a few words upon each of the five particular species of contracts to which it applies.

The *first* is—*any special promise by an executor or administrator to answer damages out of his own estate.*

The principal case on this subject is *Rann v. Hughes*, which went up to the House of Lords, and *is reported in 4 Bro. P. C. 27, 2d ed., and 7 T. R. 350, [*49] n. The point decided in that case is, that the Statute of Frauds, in no manner affected the validity of such promises, or rendered them enforceable in any case in which at common law they would not have been so;

but merely required that they should be reduced into writing, leaving the written contract to be construed in the same manner as a parol contract would have been had there been no writing. The opinion of the Judges was delivered to the House of Lords by L. C. Baron Skynner, and is extremely instructive.

The next species of promise mentioned in the 4th section is, *any special promise to answer for the debt, default, or miscarriage of another person.*

This includes all those promises which we ordinarily denominate *guarantees*, and has given rise to a very great deal of discussion.

In the first place, it has been decided that the sort of promise which the statute means, and which must be reduced into writing, is a promise to answer for the *debt, default, or miscarriage of another person, for which that other person himself continues liable.* Thus, if *A.* go to a shop, and say, "Let *B.* have what goods he pleases to order, and if he do not pay you *I* will," that is a promise to answer for a debt of *B.* for which *B.* is himself also liable; and if it be sought to enforce it, it must be shown to have been reduced into writing: (a) [*50] but if *A.* had *said, "Let *B.* have goods on my account," or "Let *B.* have goods, and charge me with them:" in these cases, no writing would be required, because *B.* never would be liable at all, the goods being supplied on *A.*'s credit and responsibility, though handed by his directions to *B.* (b)

Goodman v. Chase presents rather a singular instance of the application of the rule of construction of which I have been speaking. In that case a debtor

(a) This proposition is amply illustrated by *Birkmyr v. Darnell*, Salk. 27; *Bird v. Gammon*, 3 Bull. N. P. C. 883; *Goodman v. Chase*, 1 B. & Ald. 297; *Lane v. Burghart*, 1 Q. B. 933, E. C. L. R. vol. 41, and the notes to *Forth v. Stanton*, 1 Wms. Saund. 211.

(b) *Hargreaves v. Parsons*, 13 M. & W. 561.*

had been taken in execution, and Chase, in consideration that the creditor would discharge him out of custody, promised to pay his debt. It was held, that this promise need not be in writing; for that, by discharging the debtor out of execution, the debt was gone; it being, as you are probably aware, a rule of law, that if a debtor be once taken in execution and discharged by his creditor's consent, that operates as a satisfaction of the debt;¹ and therefore that the debtor, having ceased to be liable, the promise to pay the amount was not a promise to pay any sum for which another person was responsible, and therefore did not require to be reduced into writing. [The default or miscarriage of another person to which the statute applies need not, however, be a default or miscarriage in payment of a debt or in performing a contract. The breach *of any duty imposed by the law, against [*51] which it was the intention of the parties to secure and be secured, must be in writing. Thus,

¹ *Sharp v. Specknagle*, 3 Serg. & Rawle, 463; *Palethorpe v. Leshner*, 2 Rawle, 274; *Snevily v. Read*, 9 Watts, 396; *Lathrop v. Briggs*, 8 Cowen, 171; *Runsom v. Keyes*, 9 Id. 128; and this, although he may have been discharged on terms not afterward complied with. 1 Term. 558; 6 Id. 525; 7 Id. 420.—R.

A judgment creditor, who had taken the body of his debtor in execution, agreed that he might be set at liberty on giving security to abide the event of the trial of an issue to be framed for ascertaining whether he had the means, by the property in his marriage settlement or otherwise, of satisfying the judgment; the debtor acknowledging that this agreement was made for his accommodation, without prejudice to the creditor's right by the debtor's enlargement. The issue was tried accordingly, and found for the debtor. Held, that the taking of the body of the debtor in execution was a satisfaction of the debt, at law; and that equity would not enforce the debt against property afterwards coming to the debtor on the death of his wife, by the trusts of the marriage settlement. *Magniac v. Thompson*, 15 Howard, S. C. 281.

where one had improperly ridden another's horse, and thereby caused its death, a promise by a third person to pay a sum of money in consideration that the owner of the horse would not sue the wrongdoer was adjudged to be unavailable, because not in writing.(c)]

It was at one time thought that a verbal promise, even to answer for the debt of another for which that other remained liable, might be available if founded on an entirely new consideration conferring a distinct benefit upon the party making such promise. This idea is, however, confuted by Serjt. Williams in his elaborate note to the case of *Forth v. Stanton*, which I have already cited; and the rule there laid down by him, and which has ever since been approved of, is, that the only test and criterion by which to determine whether the promise needs to be in writing, is the question whether it is or is not a promise to answer for a debt, default, or miscarriage of another, for which that other continues liable.(d) If it be so, it must be reduced into writing: nor can the consideration in any case be of importance except in such cases as *Goodman v. [52] Chase*, in which the consideration to the person giving the promise is something which extinguishes the original debtor's liability.(e)¹ [It has also been

(c) *Kirkham v. Martyr*, 2 B. & Ald. 613.

(d) *Hodgson v. Anderson*, 3 B. & C. 855, E. C. L. R. vol. 10; *Taylor v. Hilary*, 1 C. M. & R. 743; * *Browning v. Stallard*, 5 Taunt. 450, E. C. L. R. vol. 1.

(e) You will see Serjt. Williams's criterion approved of in *Green v. Cresswell*, 10 A. & E. 453, E. C. L. R. vol. 37, and *Tomlinson v. Gell*, 6 A. & E. 564, E. C. L. R. vol. 33.

¹ To guard against the danger arising from the facility by which loose or ill-remembered words might be tortured into a contract on the part of him who used them, the common law wisely provided that a liability should not depend upon mere words unaccompanied by a consideration

considered, that, in order to make the statute applicable, the immediate object for requiring the defendant's

for their basis. And as the danger was felt to be the more strong where the words related not to an undertaking by a party for his own benefit, but on behalf of a third person, the fourth section of the Statute of Frauds superadded a writing to the common law requirement of a consideration. Whether such a provision has been conducive of more benefit than harm may well be doubted (see *Holmes v. Knights*, 10 N. H. 176), for the decisions to which it has given rise are as remarkable for their multitude as for the difficulty of their perfect classification.

The cases may naturally be divided into those where the promise of guarantee was *concurrent* with the principal contract, and those where it was *subsequent* to its creation.

1. Under the first of these classes, the *common law* is satisfied wherever the promise is made at the same time as the principal contract, and is an essential inducement to it. No other consideration is necessary than that moving between the creditor and the original debtor: *Kirby v. Coles*, Cro. Eliz. 137; and it matters not whether the promise be absolute, or conditional and dependent upon default of the other. *Leonard v. Vredenburg*, 8 Johnson, 29; *Snevily v. Johnson*, 1 Watts & Serg. 307.

The fourth section of the Statute of Frauds, however, altered the common law to this extent,—where the promise is conditional and dependent upon the default of the other it must be in writing; where, however, it is not thus conditional and dependent, but is direct and absolute, the case rests as at common law, and the statute does not apply. But there is a class of cases which, proceeding upon the suggestion of Mr. Serjt. Williams, *suprà*, seem to determine that however direct and absolute the contract of the defendant may be, it shall not be *deemed* to be a direct undertaking, so as to take the case out of the statute, unless all liability is withdrawn from the other party, and thrown entirely upon the shoulders of the defendant; in other words, although there may be a joint contract, yet if the consideration move only to one, unless *all* the credit is given to the other, the engagement of that other is collateral and not direct—it is, therefore, within the statute, and he is not liable unless his promise and its consideration appear in writing. *Rogers v. Kneeland*, 13 Wendell, 114; *Brady v. Sackrider*, 1 Sandford, 515; *Cahill v. Bigelow*, 18 Pick. 369; *Elder v. Warfield*, 7 Harris & Johns. 397; *Blake v. Parlin*, 22 Maine, 395; *Aldrich v. Jewell*, 12 Vermont, 126; *Smith v. Hyde*, 19

liability must be, that he shall pay the debt of another if that other does not; and that consequently, where

Id. 56; *Taylor v. Drake*, 4 *Strobhart*, 437; *Ware v. Stephenson*, 10 *Leigh*, 167; *Rhodes v. Leeds*, 3 *Stew. & Porter*, 212; *Faires v. Lodane*, 10 *Alab.* 50; *Holmes v. Knights*, 10 *N. Hamp.* 177; *Proprietors v. Abbott*, 14 *N. Hamp.* 159.

It has been said, that it may admit of question whether the application of this principle has not been carried too far in some cases, and whether what was in truth, as between the parties, the collateral liability, has not by means of it been transformed into a principal liability, and the real principal debtor thereby discharged through the operation of the statute: *Holmes v. Knights*, 10 *N. H.* 178; and practically it may often happen that a tradesman, thinking to increase his security by charging the goods to both parties, by that very means, under the application of the rule sanctioned by the weight of authority, loses his remedy against one of them.

It has, moreover, been suggested upon great apparent soundness of principle (in *Mr. Hare's* note to *Birkmyr v. Darnell*, 2 *Smith Lead. Cas.* 311, 4th *Am. ed.*), that the question of the defendant's liability being direct and collateral, is not necessarily wholly dependent upon the withdrawal of all credit from, and the consequent non-liability, of the party who receives the consideration; in other words, that there may be a direct liability, even where the other party is also liable. Thus, where two jointly purchase goods, the liability of one is no degree lightened by the fact of the other being also liable, nor, where the liability is thus coextensive, is it changed in any way by the goods being intended for one rather than for the other,—each being still directly liable, the contract cannot be said to be “to answer for the default of another,” and the case would seem to be unaffected by the statute.

Thus, in *Wainwright v. Straw*, 15 *Vermont*, 215, it was held that where a stove was sold to two for the use of one, each was liable, and no writing was necessary. And where the promises are several instead of joint, yet, if each has bound himself directly and absolutely, the mere fact that the consideration moves to one only, ought not, it would seem, to turn into a mere collateral, that which was in fact an original contract. “It would scarcely seem,” as was said by *Story, J.*, in *D'Wolf v. Rabaud*, 1 *Peters*, 500, “a case of a mere collateral undertaking, but rather, if one might use the phrase, a trilateral contract. Each is a direct, original promise, founded upon the same consideration.” *Townsley v. Sumral*, 2 *Peters*, 182;

the immediate object is that an agent in selling for a principal should take unusual care in selecting the

Proprietors v. Abbott, 14 N. Hamp. 157. Such a view is not, however, recognized by the class of cases first referred to, and in Taylor v. Drake, 4 Strobhart, 437, it was said that to make the delivery of goods to the one serve also as a consideration for the promise of the other, would be to strike down the statutory shield at a blow.

2. Where the promise is given *subsequently* to the creation of the debt, it is evident that the mere existence of that debt cannot, even at common law, be a sufficient consideration for the promise. (See *infra*, notes to p. 112.) Another consideration must exist to support the promise, and this may be one of two kinds,—it may either grow out of the debt itself, being connected therewith, such as the forbearance to sue the original debtor, or it may be a new and independent consideration. In the first case, although the promise could be supported at common law, it is within the statute, and a writing is necessary; in the second, the statute does not apply. Leonard v. Vredenburg, 8 Johnson, 29.

Thus, it is well settled, that a forbearance to sue the original debtor, or the discontinuance of a suit already brought, being considerations connected with, and growing out of the original contract, are, though entirely sufficient at common law, nevertheless, within the Statute of Frauds. Fish v. Hutchinson, 2 Wilson, 94; Bennett v. Pratt, 4 Denio, 275; Durham v. Arledge, 1 Strobhart, 5; Nelson v. Boynton, 3 Metcalf, 396; Stone v. Symmes, 18 Pick. 467. So, when the consideration consists in the *performance* of the preceding contract, as where a plaintiff having been employed by a contractor to build certain walls for the defendant, refused to go on unless the defendant would promise to pay him, which he did, it was held that the contract was within the statute, for the consideration related merely to the performance of the antecedent contract. Puckett v. Bates, 4 Alabama, 390.

But where there is some new and original consideration of benefit or harm moving between the new contracting parties, it is well settled that the case is not within the statute: Leonard v. Vredenburg, *supra*; as where a promise to pay an existing debt is made in consideration of property placed by the defendant in the hands of the party thus promising: Hilton v. Dinsmore, 21 Maine, 410; Todd v. Tobey, 29 Maine, 219; Olmstead v. Greenly, 18 Johns. 12; Elwood v. Monk, 5 Wendell, 235; Hindman v. Langford, 3 Strobhart, 207;

customers, and by assuming responsibility for their solvency should preclude all question of negligence on

Lee v. Fontaine, 10 Alab. 755; Hall v. Rogers, 7 Humph. 536; or where the party to whom the promise is made relinquishes a levy on the goods of the debtor; Williams v. Leper, 3 Burrow, 1886; Castling v. Aubert, 2 East, 325; Marcein v. Mack, 10 Wendell, 461; Farley v. Cleveland, 4 Cowen, 432; Tindall v. Touchberry, 3 Strobhard, 177; Dunlap v. Thorne, 1 Richardson, 213 (though two late cases in New York, and one in Massachusetts, Barker v. Bucklin, 2 Denio, 45; Kingsley v. Balcombe, 4 Barb. S. C. 131; and Nelson v. Boynton, 3 Metcalf, 396, seem to hold, in opposition to the prior authorities in the former State, that the consideration must always consist in an advantage to the debtor or the promisor, and that a detriment to the promisee will not take the case out of the statute).

It has been held in England, and in several of our States, that a promise to indemnify the guarantor against any loss in consequence of his undertaking, is not within the statute; on the ground that the promise is not that another shall perform that which he has undertaken, but that the promisee shall not lose by the engagement into which he has entered: Thomas v. Cook, 8 Barn. & Cress. 728; Chapin v. Merrill, 4 Wendell, 657; Chapin v. Lapham, 20 Pick. 467; Peck v. Thompson, 15 Vermont, 637; Holmes v. Knight, 10 New Hampshire, 175; Lucas v. Chamberlain, 8 B. Monroe, 276; Doane v. Newman, 10 Missouri, 69; Jones v. Shorter, 1 Kelly (Georg.), 294; but the more recent cases in England and in New York have not acknowledged this reasoning as satisfactory, "for every promise to become answerable for the debt or default of another may be shaped as an indemnity:" Green v. Cresswell, 10 Adolph. & Ellis, 453, 37 E. C. L. R.; Staats v. Howland, 4 Denio, 559; Kingsley v. Balcombe, 4 Barbour S. C. 131; and the same view was taken in Draughan v. Bunting, 9 Iredell, 10.

The fourth section of the Statute of Frauds has not been re-enacted in Pennsylvania, and the law of that State is therefore unembarrassed by the distinctions to which it has given rise, nor is it believed that its absence has, to any great extent, occasioned the mischief which it was the object of the statute to prevent. The student may further profitably direct his attention on this subject, to the note to *Birkmyr v. Darnell*, in 1 Smith's Lead. Cases, 322, already referred to.—R.

As before stated, an Act of Assembly of Pennsylvania, of 1855, has re-enacted so much of the 4th sect. of the Statute of Frauds as relates to the subject of this note.

his part, as where an agent sells on a *del credere* commission, the undertaking so to do need not be in writing; (*f*) for, although the transaction may terminate in a liability to answer for the debt of another, his paying that debt was not the immediate object of the contract made with him.]

In the case of *Eastwood v. Kenyon*, (*g*) the Court of Queen's Bench decided a completely new point on the construction of this branch of the 4th section. They held that the *promise*, which is to be reduced into writing, is a promise made to the person to whom the original debtor is liable; but that a promise made to the debtor himself, or even a third *person, to answer to the creditor, would not require to be [*53] reduced into writing. (*h*)

In determining, however, whether a guarantee has been sufficiently reduced into writing to satisfy the 4th section, the question which most frequently arises is, whether the consideration do or do not sufficiently appear upon the written instrument. That, *in all cases* within the 4th section, the consideration for the promise as well as the promise itself must appear in the written memorandum, has been already explained in the last lecture. It is not, however, absolutely necessary that it should be set down in express terms. It may be collected *by inference* from the entire wording of the written instrument; but then the inference relied on for this purpose must be a probable one, not a mere random guess. (*i*) To use the expression of Tindal,

(*f*) *Couturier v. Hastie*, 9 Exch. 102; * 22 L. J. (Exch.) 97, S. C.

(*g*) 11 A. & E. 446, E. C. L. R. vol. 39.

(*h*) *Hargreaves v. Parsons*, 13 M. & W. 561.*

(*i*) See *Bentham v. Cooper*, 5 M. & W. 621; * *Jarvis v. Wilkins*, 7 M. & W. 410; * *James v. Williams*, 5 B. & Ad. 1109, E. C. L. R. vol. 27; *Hawes v. Armstrong*, 1 Bing. N. C. 761, E. C. L. R. vol.

C. J., in *Hawes v. Armstrong*:—"It is not necessary that the consideration should appear in *express terms*. It would be undoubtedly sufficient, in any case, if the memorandum is so framed that any person of ordinary capacity must infer from the perusal of it that such and no other was the consideration upon which the undertaking was given. Not that a mere *conjecture*, [*54] however plausible, would be *sufficient to satisfy the statute, but there must be a well-grounded inference, to be necessarily collected from the terms of the memorandum."

It may be useful, in order to impress upon the mind this doctrine, which is of very frequent practical application, to give one or two examples of decided cases in which the consideration for a guarantee has been held to appear sufficiently *by inference* from the other portions of the memorandum, although not stated in express terms.

In *Newbury v. Armstrong*, (*k*) the memorandum in writing relied on for the purpose of satisfying the exigency of the 4th section of the Statute of Frauds was as follows:—

"To Mr. John Newbury.

"Sir,

"I, the undersigned, do hereby agree to bind myself to you, to be security for S. Corcoran, late in the employ of J. Pearson, of London Wall, for whatever you may intrust him with while in your employ, to the amount of £50, in case of any default to make the same good.

(Signed) "W. ARMSTRONG."

Here you see is not a word *expressly* said about the consideration for Armstrong's becoming security; and it [*55] was objected upon that ground that the writing in question was not a sufficient *memorandum to

27; *Emmett v. Kearns*, 5 Bing. N. C. 559, E. C. L. R. vol. 35; *Caballero v. Slater*, 23 L. J. (Ch.) 67.

(*k*) 6 Bing. 201, E. C. L. R. vol. 19.

satisfy the statute. The Court of Common Pleas, however, held, that it was but a fair inference from the terms of the instrument, that the consideration was to be the employment of Corcoran in the service of Newbury. "The words (says the Lord Chief Justice) are all *prospective*: it may fairly be implied, that Corcoran had left one service, and that the guarantee was given in consideration of his being taken into another. Similar to this in principle was the case of *Stapp v. Lill*,^(l) where the memorandum relied on was worded thus:—

"I guarantee the payment of any goods which Mr. John Stapp shall deliver to Mr. Nicholls, of Brick Lane.

"JOHN LILL."

It was decided by Lord Ellenborough first, and afterwards by the whole Court of Queen's Bench, that this instrument was sufficient; for that it might fairly be collected, from its terms, that Lill intended the consideration for his own liability to be the delivery of goods by Stapp to Nicholls.

On the other hand, in the well-known case of *Saunders v. Wakefield*,^(m) the guarantee was as follows:—

"Mr. Wakefield will engage to pay the bill drawn on 'Pitman in favor of Stephen Saunders.'"

*This was held insufficient, for it appeared from the memorandum that the bill was already drawn, and it did not appear that Wakefield had anything to do with the drawing, or had requested Saunders to advance anything upon it; and, consequently, it did not appear that there was any consideration for his promise to pay it. [For a similar reason, a writing

^(l) 1 Camp. 242; 9 East, 348. See *Jarvis v. Wilkins*, 7 M. & W. 410.*

^(m) 4 B. & Ald. 595, E. C. L. R. vol. 6. See *Bell v. Welch*, 9 C. B. 154, E. C. L. R. vol. 67.

in the following words, "Mr. P—, I will see you paid for 5*l.* or 10*l.* worth of leather, on 6th Dec., for T. L., shoemaker," is insufficient;(n) for it cannot be collected from the memorandum whether the consideration was the future supply of the leather, or the given time to pay for it.]

In all these cases you must recollect, that, if verbal evidence had been allowed, it might have appeared clear enough that there was a good consideration for the promise sued on; but as it is indispensably necessary that the consideration should appear, not from such evidence, but from the instrument itself, it became necessary in every case to look narrowly at the words, with a view of ascertaining, as in the instances I have just put, whether, though it do not appear in terms, it may not be collected by inference; [and in drawing this inference it must be recollected, that it is always proper to consider the circumstances under which the writing was made;(o) and that, if it is ambiguous [*57] and capable of such a meaning as will support it, parol evidence may be called in to construe it according to such circumstances, although never to contradict it.(p)] I think I have sufficiently explained the nature of these inquiries; but if you think fit to pursue the subject, you may refer to the cases cited below,(q) which are the most recent decisions on this branch of the law.(A)

(n) *Price v. Richards*, 15 M. & W. 539.*

(o) *Bainbridge v. Wade*, 16 Q. B. 89, E. C. L. R. vol. 71.

(p) *Goldshede v. Swan*, 1 Exch. 154.*

(q) *Raikes v. Todd*, 8 A. & E. 846, E. C. L. R. vol. 35; *Bentham v. Cooper*, 5 M. & W. 628; **Jarvis v. Wilkins*, 7 M. & W. 410; **Brooks v. Haigh*, 10 A. & E. 323, E. C. L. R. vol. 37; *Kennaway v. Treleavan*, 5 M. & W. 498; *and *Edwards v. Jevons*, 8 C. B. 436, E. C. L. R. vol. 65.

(A) In *Kennaway v. Treleavan* the guarantee was thus worded: "Gentlemen, I hereby guarantee to you the sum of 250*l.*, in case

There is one thing which, though collateral to the Law of Contracts, relates so peculiarly to this branch

Mr. P. should default in his capacity of agent and traveller to you." It was held that the future employment of Mr. P. was the consideration of this promise, and that it sufficiently appeared by inference from the terms of the guarantee. But the case of *Haigh v. Brooks*, 10 Ad. & Ell. 309, 37 E. C. L. R., is the strongest on this point, and has carried the latitude of inference to its extreme length: it was cited in the recent case of *Chapman v. Sutton*, 15 Law Jour. C. P. 166; and the guarantee was thus worded: "In consideration of your *being in advance* to Messrs. John Lees & Co. in the sum of 10,000*l.*, for the purchase of cotton, I do hereby give you my guarantee for that amount (say 10,000*l.*) on their behalf;" and it was held, that whether the consideration, "your *being in advance*," was or was not a good consideration, depended upon the transaction to which the guarantee referred. Lord Denman, C. J., remarks: "Being in advance does not necessarily mean that the plaintiff was in advance at the time of the giving of the guarantee. It may have been intended as prospective." The judgment in the Exchequer Chamber was given upon this ground; and Lord Abinger, C. B., said that "there was in the guarantee an ambiguity that might be explained by evidence, so as to make it a valid contract."

Raikes v. Todd, above cited, is a good illustration of an insufficient disclosure of consideration. The guarantee was thus expressed: "Gentlemen, I hereby undertake to secure to you the payment of any sums of money you *have* advanced, or *may hereafter* advance, to Messrs. Davenport & Co., on their account with you, commencing on the 1st November, 1831, not exceeding 2,000*l.*" Here it was held that the guarantee disclosed no consideration for the *past* advances, and was to that extent invalid, but that it was good as regarded the future advances. Thus, if the guarantee consist of several promises, that which is bad may be rejected without invalidating the remainder of the guarantee. There is no practical difference between past and future considerations, so long as the guarantee discloses a sufficient consideration in law to support the promise (of which see the next lecture). The consideration need not be coextensive with the promise. (See *Raikes v. Todd*, per *Ld. Denman*, C. J.) And the Courts will no longer enter into the question of adequacy of the consideration. See *Chapman v. Sutton* (*supra*), which is the last case where the question of the sufficiency of the inference of a consideration has arisen. See, also, *Lang v. Neville*, 6 Jurist, 217, and *Johnson v. Nicholls*, 1 C. B. 251, 50 E. C. L. R.

of the Statute of Frauds, that I think it ought to be mentioned. After the 4th section of the Statute of

It is permissible to adduce, in evidence of the consideration, the written correspondence between the parties, if that correspondence has been referred to in the guarantee, but not otherwise. See *Dobell v. Hutchinson*, 3 Ad. & Ell. 355, 30 E. C. L. R., and *Higgins v. Dixon*, 14 Law Jour. Q. B. 329.

The rules which govern the construction of contracts, and which will be afterwards considered, of course apply to guarantees. But there is one peculiarity attaching to them, which it may be well to notice here. Guarantees are either for definite or indefinite sums or periods: where they are not limited as to the amount guaranteed, or, being so limited, are in either case intended to affect future transactions until revoked, they are termed continuing guarantees. The distinction between these two classes of guarantee is one of some nicety, and often of importance, as regards the sufficiency of the consideration, which again frequently depends upon whether it be past or prospective.

The only safe rule of construction is to give the words used their natural meaning, taking into account the attendant circumstances which are admissible in evidence to throw light upon the intent of the parties to the instrument. This rule has been recently applied in the case of *Allnutt v. Ashendon*, 5 M. & Gr. 392, 44 E. C. L. R., where the guarantee was thus worded: "I hereby guarantee Mr. John Jennings's account with you for wine and spirits, to the amount of 100*l*." This was held to apply to an existing account; for, said Tindal, C. J., "by account I understand the parties to mean some account contained in some ledger or book; and the case shows that there was such an account existing at that time. The natural construction of the guarantee therefore is, that it relates to that account." In the subsequent case of *Hitchcock v. Humfrey*, 5 M. & Gr. 559, 44 E. C. L. R., the defendant, having guaranteed the payment of goods to be supplied by the plaintiffs to A., up to the 1st of July, gave, on the 9th of April, the following additional guarantee: "In consideration of your extending the credit already given to A., and agreeing to draw upon him at three months from the first of the following month, for all goods purchased up to the 20th of the preceding month, I hereby guarantee the payment of any sum that shall be due and owing to you upon his account for goods supplied." This was held to be a continuing guarantee: the words "following month" and "preceding month" being held to have a general application, the terms of the first

Frauds had rendered verbal guarantees unavailable, it became the fashion in such cases to bring actions upon

gaurantee being taken into account in construing the language of the second. For other cases of the construction put on these instruments, see *Mayer v. Isaac*, 6 M. & W. 605; *Jenkins v. Reynolds*, 3 B. & B. 14, 7 E. C. L. R.; *Allan v. Kenning*, 9 Bing. 618, 23 E. C. L. R.; *Batson v. Spearman*, 9 A. & Ell. 298, 36 E. C. L. R.; *Hargreave v. Smee*, 6 Bing. 244, 19 E. C. L. R.; *Nicholson v. Paget*, 1 C. & M. 48; *Martin v. Wright*, 14 Law Jour. Q. B. 142 [since reported, 6 Queen's Bench, 917, 51 E. C. L. R.]; and *Johuston v. Nicholls*, supra.¹

The cases turn, as remarked by the Lord Chief Justice in that of *Martin v. Wright*, on the particular terms of each guarantee, and it is therefore impossible to lay down any less general rule of construction than that which we have endeavored to give.

Promises to answers for tortious defaults are within the operation of the statute, as well as guarantees of credit. *Kirkham v. Marter*, 2 B. & Ald. 613, is a leading authority on this point. A. having killed B.'s horse, C. guarantees to B., the owner, to answer for the damage: this was held to be within the statute. Lord C. J. Abbott distinguished this case from that of *Read v. Nash*, 1 Wils. 305, but which Serjeant Williams thinks it overrules. 1 Saund. 211 c. n. 1.

Shares in a joint stock company are mere choses in action; but railway shares, it is submitted, inasmuch as they give an interest in land, would fall under the operation of the 4th section.

¹ So a guarantee, "If D. wishes to take goods of you, we are willing to lend our names as security for any amount he may wish," was held not to extend beyond the first delivery of goods. *Rogers v. Warner*, 8 Johnson, 119. The same construction was given in *Aldrich v. Higgins*, 16 Serg. & Rawle, 212, where the words were: "L. C. having a desire to enter into trade in a small way, we hereby offer ourselves as security to any gentleman who may feel disposed to give him credit not exceeding \$700, or anything less, as he may think proper to contract;" in *White v. Reed*, 15 Connect. 457: "In any sum my son G. may become indebted to you, not exceeding \$200, I will hold myself accountable;" in *Anderson v. Blakely*, 2 Watts & Serg. 237: "Mr. P. having informed me that he is making some purchases from you, and that you wish some reference, I would say that you might credit him with perfect safety, and that anything he might purchase from you I will see paid for," where the Court said:

the case for *false representations*, under circumstances in which, before the Act, the transaction would have

"There is more reason, perhaps, for giving a freer interpretation where the sum is, as in several of the cases, limited, because there the party intrenches himself within a certain amount, beyond which he can in no case be made liable. But when there is no restriction of the amount, the guarantee should be carefully scanned, to see whether it justifies a party in the large construction contended for." And the same view was taken in *Whitney v. Groot*, 24 Wendell, 82, upon the words: "We consider I. V. good for all he may want of you, and we will sell him all he reasonably asks of us on credit, and we will indemnify the same." On the other hand, in *Grant v. Risdal*, 2 Harris & Johns. 186, "I will guarantee their engagements, should you think it necessary, for any transaction they may have with your house," was held to be a continuing guarantee till countermanded, but the reasons for the judgment are not reported. Instances of continuing guarantees will be found in *Clark v. Burdett*, 2 Hall, 197; *Mussey v. Rayner*, 22 Pick. 223; *Bent v. Hartshorne*, 1 Metcalf, 24; *Douglass v. Reynolds*, 7 Peters, 113; *Lawrence v. M'Calmont*, 2 Howard (U. S.) 426. As, for example, "Mr. R. is about to establish a store of books and stationery. He will commence on a limited scale with the intention of enlarging the business next spring. He wishes to purchase school-books, &c., on a credit of four or six months, and paper, &c., on commission. For the faithful management of the business, and punctual fulfilment of contracts relating to it, the subscriber will hold himself responsible;" *Mussey v. Rayner*.

While it is undoubtedly true that each case must depend on the particular terms of the guarantee, aided by the attendant circumstances of the parties, it has been often suggested, if not held, that the language should be very strong to justify a court in holding a guarantee to be a continuing one, until notice given to the contrary: per Story, J., in *Cremer v. Higginson*, 1 Mason, 336; *Nicholson v. Paget*, 1 Crompt. & Meeson, 48; while, on the other hand, it has been more repeatedly held that the ordinary maxim, that the words of the instrument should be taken most strongly against the party using them, fully applied to guarantees; *Mason v. Pritchard*, 12 East, 227; *Merle v. Wells*, 2 Campbell, 413; *Drummond v. Prestman*, 12 Wheaton, 515; *Douglass v. Reynolds*, *supra*, *Mayer v. Isaac*, 6 Mees. & Welsby, 610, where the remarks in *Nicholson v. Paget*, *supra*, are disapproved.

There is an important class of cases upon the subject of notice to

been looked on as one of guarantee. For instance if A. went to a tradesman to persuade him to supply goods

the guarantor, the doctrine of which may be said to be almost peculiarly American. It is a rule of the common law, that where a party stipulates to do a certain thing in a certain specific event which may become known to him, or with which he may make himself acquainted, he is not entitled to any notice, unless he stipulates for it; but when it is to do a thing which lies in the peculiar knowledge of the opposite party, then notice ought to be given him. *Vyze v. Wakefield*, 6 Mees. & Welsby, 452. But in the cases of *Russell v. Clark*, 7 Cranch, 69, and *Edmundson v. Drake*, 5 Peters, 624, this principle was, in its application to mercantile guarantees, thought rather an obligation of commercial than of the common law, and in the subsequent case of *Douglass v. Reynolds*, 7 Peters, 113, which is a leading case upon the subject, this view was directly sanctioned, and it was held that notice of the acceptance of a guarantee, and of the giving credit under it, must be given to the guarantor immediately or within reasonable time (unless, indeed, in the case of a continuing guarantee, when it would not be necessary to give notice of each successive transaction as it arose, but after the transactions were closed, notice of the whole amount for which the guarantor was held responsible should be given to him within a reasonable time); and further, that demand of performance must be made upon the principal, and immediate notice of his default given to the guarantor, and that a failure so to do would discharge the latter, unless it be clearly made out that under the circumstances of the case no injury had resulted to him from the neglect. This rule has been frequently affirmed by the Supreme Court of the United States, and adopted in most of the States, and the student will find the authorities collected and their distinctions classified in the first volume of *American Leading Cases*, p. 50, note to *Douglass v. Reynolds*. Some of the authorities where the subject is most elaborately discussed, are *Craft v. Isham*, 13 Connecticut, 28; *Wildes v. Savage*, 1 Story, 22; *Howe v. Nickels*, 22 Maine, 175. In many of the cases notice would have been necessary under the common law rule referred to, but the authorities have based them upon the principles of commercial law.

In New York, however, dissent from this doctrine of notice has been expressed in *Douglass v. Howland*, 24 Wendell, 35; *Whitney v. Groot*, Id. 82; *Smith v. Dann*, 6 Hill, 543; *Curtis v. Brown*, 2 Barbour's S. C. R. 51; *Union Bank v. Coster*, 3 Comstock, 203. In the first of these cases the defendant's agreement was such (viz. that

to B., by assuring him that he should be paid for them, the tradesman, in case of B.'s default, could not, it is

one B. should faithfully perform an agreement with the plaintiff to account and pay over all such sums as should be found due from him to the latter), as would not have required notice under any circumstances, as the events to which it referred, though prospective, were not dependent on the option of the plaintiff; but the Court held that as a general rule, when nothing on the face of the guarantee required notice, the Court could not exact one as a condition precedent to a recovery. In the opinion of the annotator referred to, the weight of reasoning lies between these two classes of cases, and points to the following rule: that in all cases in which the contract of a guarantor does not determine precisely the nature and the amount of liability for which he is willing to make himself responsible, and leaves either or both these points to the choice of the person who seeks to enforce the guarantee, the latter is bound to give notice of the mode in which he has exercised the election thus accorded him, and cannot complain that there has been a default on the part of the defendant before giving him precise information as to what is necessary to be done in order to fulfil his engagements; but that when the defendant's contract, instead of leaving open the cause of action upon which he is willing to make himself liable, points out some mode of performance, in consideration of which he is willing to be bound, either directly or on behalf of another person, an action will lie without notice as soon as the consideration has been performed.

Notwithstanding a few decisions or dicta to the contrary, 2 M'Lean, 21, Id. 369, Id. 557, the weight of authority has unquestionably settled, that however necessary notice may be to a recovery, it need not be averred in the declaration: Gibbs v. Cannon, 9 Serg. & Rawle, 198; Rhett v. Poe, 2 Howard, 485; Salisbury v. Hale, 12 Pickering, 424; Dole v. Young, 24 Id. 250; Wildes v. Savage, 1 Story, 22; inasmuch as the want of notice will only operate as a defence to the guarantor where it has resulted in some actual injury to him, and is different in its operation in this respect from the notice required to charge an indorser of a negotiable instrument, in which case the rule is inflexible and open to no inquiry whether notice could have availed him or not, as in either case the indorser is absolutely discharged.

Before leaving the subject of guarantees, it may be remarked that in Pennsylvania, a peculiar signification has been given to the word *guarantee*, as distinguished from other words of similar import, such as "agree to become answerable," or the like, and a guarantee of a

true, bring an action of assumpsit as upon a warranty, because there was no written memorandum of what passed; but he brought an action on the case, in which he accused A. of having knowingly* deceived him as to B.'s ability to pay: and if the jury [*58] thought this case made out (as a jury composed of tradesmen were very apt to do), he succeeded in his action, and received pretty nearly the same sum as he would have done if there had been a guarantee. However, as this was a palpable evasion of the Statute of Frauds, the legislature put an end to it by enacting, in statute 9 Geo. 4, c. 14, commonly called Lord Tenterden's Act, "that no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person to the intent or purpose that such

debt due by another (which it will be remembered, owing to the absence of the fourth section of the Statute of Frauds in that State, need not be in writing), merely imports an undertaking that the debt is susceptible of collection, and the guarantor is not liable until the insolvency of the principal is shown. Such a course of decision, though it has been sometimes regretted, is firmly established by a class of cases. *Chapman v. Johnson*, 3 Penn. Rep. 18; *Isett v. Hoge*, 2 Watts, 128; *Snively v. Ekel*, 1 Watts & Serg. 204; *Parker v. Culbertson*, 1 Wallace, Jr. 161.—R.

A guarantor may specify in the letter of credit the terms on which he will be bound; and if these terms are complied with he is bound, though the law would have prescribed the performance of other acts by the party seeking to subject him on his guarantee. Therefore a guarantor undertaking to pay on receiving—reasonable notice of the failure of the principal debtor to pay, dispenses with notice of the acceptance of the guarantee, even if the law would have required such notice. *Wadsworth v. Allen*, 8 Grattan, 174. For other cases on the subject of guarantee, *Baker v. Rand*, 13 Barbour, 152; *Spicer v. Norton*, *Ibid.* 542; *Bickford v. Gibbs*, 8 Cushing, 154; *Klein v. Currier*, 14 Illinois, 237; *Farmers and Mechanics' Bank v. Kercheval*, 2 Michigan, 504.

other person may obtain credit, money or goods upon, (r) unless such representation or assurance be made in writing, signed by the party to be charged therewith."

The effect of this section was much discussed in the great case of *Lyde v. Barnard*, (s) the judgments in which deserve a very attentive perusal.¹ [In the construction of this statute it has since been considered that a representation by any person, that the title deeds of an estate which A. had bought were in that person's possession, that nothing could be done with the estate without his knowledge, and consequently that the plaintiff *would be safe in lending money to A., [*59] was a representation made concerning A.'s ability; and therefore, as it was not in writing, the defendant was not liable on account of its falsehood. (t) It has also been considered that a representation by a partner as to the credit of a firm in which he was a partner is a representation as to the credit of another person within the meaning of the statute. (u)]

The third of the species of contracts enumerated by the 4th section, and required by it to be evidenced in writing is—*any agreement made in consideration of marriage*.

It has been decided, that an agreement between two persons to marry is not an agreement in consideration of marriage within the meaning of this enactment; but that these terms are confined to promises to do something in consideration of marriage other than the per-

(r) It was probably intended that the words "money or goods upon," which were added in the Committee upon the Bill, should precede the word "credit." (s) 1 M. & W. 99.*

(t) *Swan v. Phillips*, 8 A. & E. 457, E. C. L. R. vol. 35.

(u) *Devaux v. Steinkeller*, 6 Bing. N. C. 84, E. C. L. R. vol. 37.

¹ See the remarks upon this act in *Ewins v. Calhoun*, 7 Vermont, 83. A similar statute exists in Massachusetts. Rev. St. c. 74, § 3. —R.

formance of the contract of marriage itself, (x)¹—a decision which shows how very cautious a man ought to be in pronouncing an opinion upon the construction of any statute.

We now come to the fourth class of promises enumerated by the 4th section, viz.—*any contract for the sale of lands, tenements, or heraditaments, or any interest in or concerning them.*

*These words, you will observe, are exceedingly large, comprehending not merely an interest in land itself, but any interest *concerning* it. And the main questions which have arisen have accordingly been—Whether particular contracts, falling very near the line, do or do not *concern land*, so as to fall within these terms. Thus it was held in *Crosby v. Wadsworth*, (y) that an agreement conferring an exclusive right to the vesture of land (*i. e.* a growing crop of mowing grass) during a limited time and for given purposes, is a contract for sale of an interest in, or at least *concerning* lands; and for the non-performance of which, if made by parol, an action cannot be maintained. In *Tyler v. Bennett*, (z) an agreement that the plaintiff should be allowed to take water from a particular well was held to concern land, and to require a writing.² On the other hand, in *Evans v. Roberts*, (a)

(x) *Cork v. Baker*, 1 Str. 34; *Harrison v. Cage*, 1 Ld. Raym. 386; *Countess of Montague v. Maxwell*, 1 Str. 236.

(y) 6 East, 602.

(z) 5 A. & E. 377, E. C. L. R. vol. 31.

(a) 5 B. & C. 829 (b), E. C. L. R. vol. 11.

¹ The doctrine of these cases was affirmed in *Ogden v. Ogden*, 1 Bland, 287, and *Clark v. Pendleton*, 20 Connect. 508.—R.

² So of a right of permanently overflowing the land of another: *Harris v. Miller*, 1 Meigs, 156; or erecting a permanent mill-dam: *Stevens v. Stevens*, 11 Metcalf, 251; *Thompson v. Gregory*, 4 Johns. 31.—R.

So a right to dig and carry away ore. *Riddle v. Brown*, 20 Ala-

where the plaintiff had sold to the defendant a growing crop of potatoes, this was decided not to be a sale of any *interest in or concerning land*. It was contended that, as the potatoes were deriving nourishment and support from the soil, and would have passed as part of the land by a conveyance of it, an interest in them must at all events be taken to *concern land*; and great reliance was placed on the decision in *Crosby v. Wadsworth*, *which I have already cited: and where [*61] a growing crop of grass was sold and was to be mowed by the vendee, the sale was held to fall within the statute, and require a writing. However, the Court held that that case was distinguishable. "Although," said Mr. Justice Holroyd, "the vendee might have an incidental right by virtue of his contract to some benefit from the land while the potatoes were arriving at maturity, yet I think he had not an interest in land within the meaning of this statute: he clearly had no interest so as to entitle him to the possession for any period, however limited, for he was not to raise the potatoes. Besides, this is not a contract for the sale of the produce of any specific part of the land, but of the produce of a cover of land. The plaintiff did not acquire by the contract any interest in any specific portion of the land: the contract only binds the vendor to sell and deliver the potatoes at a future time at the request of the buyer, and he was to take them away."

With regard to this case it is worth while to observe, that though, according to the decision of the Court,

bama, 412; *Briles v. Pace*, 13 Iredell, 279. An agreement not to claim damages for flowing one's land, if the other party will erect a dam and mill, is not the conferring of any right, interest, or easement in land, but only a waiver of a claim for pecuniary damages, and need not be in writing. *Smith v. Goulding*, 6 Cushing, 154.

the contract did not fall within the 4th section, as the sale of an interest in or concerning lands, yet it would clearly fall within the 17th, to which, before the conclusion of these Lectures, I shall have occasion to advert, as being a sale of goods and chattels; but no point arose upon that *section, because one [*62] shilling had been paid as *earnest money*, which is one of the modes of satisfying the provisions of the 17th section.

[The result of these cases, and of the many others which have been decided upon the subject, is thus stated in Williams' Saunders: (b) "It appears to be now settled, that with respect to emblements or fructus industriales (*i. e.* the corn and other growth of the earth, which are produced, not spontaneously, but by labor and industry), a contract for the sale of them while growing, whether they are in a state of maturity, or whether they have still to derive nutriment from the land in order to bring them to that state, is not a contract for the sale of any interest in land, but merely for the sale of goods: *Evans v. Roberts*; (c) *Sainsbury v. Mathews*. (d) And it will make no difference whether they are to be reaped or dug up by the buyer or by the seller: *Jones v. Flint*. (e)¹ The true question is, whether, in order to effectuate the intention of the parties, it be necessary to give the buyer

(b) *Duppa v. Mayo*, 1 Wms. Saund. 277 c, n. (f). A similar and very clear view of this subject is also taken by Lord St. Leonards—see Concise View of Law of V. & P. 7-78, ed. 1851.

(c) 5 B. & C. 829, E. C. L. R. vol. 13.

(d) 4 M. & W. 343.*

(e) 10 A. & E. 753, E. C. L. R. vol. 37.

¹ A verbal contract to pay for improvements on land, held adversely to the promisor, in consideration that the tenant would attorn to him and pay him rent for his unexpired term, is not within the statute. *Cassell v. Collins*, 23 Alabama, 676.

an interest in the land, or whether an easement of the right to enter the land for the purpose of harvesting [*63] and carrying them away is all that was *intended to be granted to the buyer. But with respect to grass, which, as being the natural produce of the land, is said to be not distinguishable from the land itself in legal contemplation until actual severance, the decision of *Crosby v. Wadsworth* appears to be still adhered to, viz. that the purchaser of a crop of mowing grass, unripe, and which he is to cut, takes an exclusive interest in the land before severance; and therefore the sale is a sale of an interest in land within the statute.(f) So it has been held, that the sale of growing underwood to be cut by the purchaser confers an interest in land within the statute.(g) The same has been held as to an agreement for the sale of growing fruit.(h) But where the owner of trees growing on his land agrees with another while they are standing to sell him the timber, to be cut by the vendor, at so much per foot, this is a contract merely for the sale of goods.(i) And, per Littledale, J., even if the contract were for the sale of the trees, with a specific liberty to the vendee to enter the land to cut them, this would not give him an interest in the land within the meaning of the statute.(k) In a recent case on this [*64] subject *where the plaintiff and defendant orally agreed (in August) that the defendant should give 45*l.* for the crop of corn on the plaintiff's land, and the profit of the stubble afterwards, that the

(f) *Carrington v. Roots*, 2 M. & W. 248.*

(g) *Scorell v. Boxall*, 1 Y. & J. 396.*

(h) *Rodwell v. Phillips*, 9 M. & W. 501.*

(i) *Smith v. Surman*, 9 B. & C. 561, E. C. L. R. vol. 17.

(k) 9 B. & C. 573, E. C. L. R. vol. 17. But see *Teal v. Auty*, 2 B. & B. 99, E. C. L. R. vol. 6; 9 M. & W. 501,* *supra*.

plaintiff was to have liberty for his cattle to run with the defendant's, and that the defendant was also to have some potatoes growing on the land, and whatever lay grass was in the fields, and the defendant was to harvest the corn and dig up the potatoes, and the plaintiff was to pay the tithe; it was held, that it did not appear to be the intention of the parties to contract for any interest in land, and the case was not, therefore, within the statute, but a sale of goods as to all but the lay grass, and as to that a contract for the agistment of the defendant's cattle. (l)

An agreement to occupy lodgings at a yearly rent, the occupation to commence at a future day, is an agreement for an interest in land within the 4th section. (m)

And such also is an agreement, that, if one will take possession of a house and become tenant upon its being properly furnished, the other will furnish it properly. (n)

The same conclusion has been come to where [*65] one entered into an agreement with another to relinquish, and give possession to him of a furnished house for the residue of a term which the former had therein, in consideration of a sum of money to be paid by the latter for certain repairs to be done to the house. It was considered, that the contract was not merely that one side should repair and relinquish possession and the other pay the money for the repairs, but that, the relinquishment being for the remainder of a term, an assignment was contemplated, which was clearly an

(l) *Jones v. Flint*, 10 A. & E. 753, E. C. L. R. vol. 37; *Duppa v. Mayo*, 1 Wms. Saund. 277 c, note (f).

(m) *Inman v. Stamp*, 1 Stark. N. P. C. 12, E. C. L. R. vol. 2.

(n) *Mechelen v. Wallace*, 7 A. & E. 49, E. C. L. R. vol. 34; *Vaughan v. Hancock*, 3 C. B. 766, E. C. L. R. vol. 54.

interest in land.(o) The law is the same whether the interest agreed to be assigned or parted with be legal or equitable.(p)]¹

(o) *Buttemere v. Hayes*, 5 M. & W. 456; * *Cocking v. Ward*, 1 C. B. 858, E. C. L. R. vol. 50.

(p) *Kelly v. Webster*, 21 L. J. (C. P.) 163.

¹ In *Evans v. Roberts* (which was approved in *Dunne v. Ferguson*, 1 Hayes' (Irish) Rep. 542, where is an able opinion by Joy, Ch. Baron), the case of *Emerson v. Heelis*, 2 Taunton, 38, was virtually overruled, and *Waddington v. Bristow*, 2 Bos. & Pul. 452, endeavored to be explained. Those cases decided that a sale of growing turnips and hops was within the fourth section of the statute. In *Rodwell v. Phillips*, cited *supra*, Lord Abinger suggested that the difference appeared to be between annual productions raised by the labor of man, and the annual productions of nature, not referable to the industry of man, except at the period when they were first planted; which, together with the disapprobation expressed of *Waddington v. Bristow*, *supra*, would seem to determine that an annual crop is not within the fourth section of the statute; and it seems to be generally held, on this side of the Atlantic, that such a crop is personal property, and as such can be sold by the owner or taken in execution: *Newcomb v. Rayner*, 2 Johnson, 430; *Whipple v. Foot*, Id. 418; *Stewart v. Doughty*, 9 Id. 212; *Austin v. Sawyer*, 9 Cowen, 39; *Stambaugh v. Ycates*, 2 Rawle, 161; *Myers v. White*, 1 Id. 356; *Bank of Pennsylvania v. Wise*, 3 Watts, 406; *Penhallon v. Dwight*, 7 Mass. 34; *Cutter v. Pope*, 13 Maine, 377; *Craddock v. Riddleberger*, 2 Dana, 205; *Brittain v. M'Kay*, 1 Iredell, 265; *Green v. Armstrong*, 1 Denio, 556: though, if not severed, it would pass by a conveyance or devise of the land: *Bank of Pennsylvania v. Wise*, 3 Watts, 406; *Sallade v. James*, 6 Barr. 144; *Bear v. Bitzer*, 4 Harris, 175; *Groff v. Levan*, Id. 179; and in the last two cases it was suggested that the reason why a previous sale of the grain would defeat the right of a subsequent purchaser of the land was because such sale was an implied severance of the grain.

The weight of authority would also seem to determine that trees, sold as timber, and to be presently cut and delivered, or trees and plants growing in a nursery, to be presently transplanted, are also personal property: *Anon.* 1 Ld. Raym, 182; *Smith v. Surnam*, *supra*; *Erskine v. Plummer*, 7 Greenleaf, 447; *Miller v. Baker*, 1 Metcalf, 27; *Whitemarsh v. Walker*, Id. 313; *Chaffin v. Carpenter*,

In all these cases, however, the observation applies which I have made in the former lecture with reference to cases falling within this section in general. The contract, even if by mere *words*, is not void, but merely incapable of being enforced by action. (q) And therefore it has been held, that, if it actually has been executed, for instance, in the case of a sale of growing crops, by the vendee's reaping them and taking them away, an action will lie to recover the price as for goods sold and delivered. (r)

A curious point has been decided upon this [66] section with reference to a parol demise of land. Such a demise, if for not more than three years, is good within the 1st section of the Statute of Frauds, which enacts, that "all *leases, estates, interests of freehold*, or terms of years, or any *uncertain interest* of, in, to, or

(q) *Leroux v. Brown*, 22 L. J. (C. P.) 1.

(r) *Parker v. Staniland*, 11 East, 362; *Poulter v. Killingbeck*, 1 B. & P. 397. And see the judgment in *Teal v. Auty*, 2 B. & B. 99, E. C. L. R. vol. 6. See *Kelly v. Webster*, 21 L. J. (C. P.) 163; *Cocking v. Ward*, 1 C. B. 858, E. C. L. R. vol. 50.

4 Id. 580; *Yale v. Seely*, 15 Vermont, 221. But when the property in the trees is not to pass until they be severed, or if time is to be allowed for them to reach maturity, it would seem that the sale is one of an interest in land, and not of a chattel. *Putney v. Deal*, 6 New Hamp. 430; *Green v. Armstrong*, 1 Denio, 550; 5 Barbour's 3. C. R. 364. Mannre has been held to be part of the realty, whether reaped in a barn-yard or spread upon the ground. *Wetherbee v. Ellison*, 19 Vermont, 379.

It may be here remarked, that even if the contracts referred to do not fall within the fourth section of the statute, because not relating to an interest in land, they must necessarily fall within its seventeenth section, because they relate to chattels. Moreover, if the contract is an entire one, as for the sale of the realty with the crops growing upon it, a court has no right to apportion it; and if the sale of the realty be avoided by the statute, that of the personalty will also fall. *Rock v. Thayer*, 13 Wendell, 53; *Loomis v. Newhall*, 15 Pick. 166.

out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in *writing*, and *signed* by the parties so making or creating the same, or their agents thereunto lawfully authorized *by writing*, shall have the force and effect of leases or estates at will only." The 2d section excepts "all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two third parts at the least of the full improved value of the thing demised." (s)¹ But an *agreement* for such a lease falls, not within the 1st, but within the 4th section; for it is an agreement for an interest in lands; and, therefore, though a lease for a year would be perfectly good though made verbally, an agreement for such a lease cannot be enforced. That was the point decided in [*67] *Edge v. Strafford* : (t) "It may be said," said *Bayley, B., delivering the judgment of the Court in that case, "that it is strange that the 2d section of the statute has made a lease for less than

(s) 29 Car. 2, c. 3, ss. 1, 2. (t) 1 C. & J. 391; *1 Tyr. 293.

¹ By the Massachusetts statute, *all* parol leases (without exception as to duration) have the effect of leases at will only. *Ellis v. Paige*, 1 Pick. 43; *Hingham v. Sprague*, 15 Id. 102; *Hollis v. Paul*, 3 Metcalf, 551; *Kelly v. Waite*, 12 Id. 300. So in Maine. *Little v. Pallister*, 3 Greenleaf, 15; *Davis v. Thompson*, 13 Maine, 214. By the New York Revised Statutes (2 Rev. St. p. 194), no estate or interest in land other than leases for a term not exceeding one year can be created, unless by operation of law or by writing. In Connecticut (statute of 1838) such leases are invalid, except as against the grantor. The Pennsylvania statute (1772) is, as to this, exactly copied from that of 29 Car. 2; omitting, however, the part as to the reservation of rent. This part, however, it will be perceived, was evidently inserted in the English statute as a guard against perjury, in supporting a parol lease for three years or less.—R.

three years from the making valid; and yet, that no action shall be maintainable upon it until it is made effectual as a lease by the entry of the lessee. But, first, the legislature might intend to make a distinction between those cases in which the complaining party was contented to confine himself to its operation as a lease, and sought nothing more than as a lease it would give him, and those in which he went further, and founded upon it a claim for damages, which might far exceed what he could claim under it in the character of a lease; or, secondly, this distinction might not have been contemplated, but may be the result of the true construction of the Statute of Frauds. The 1st section of that statute provides—that all leases, estates, interests of freehold, or term of years, or any uncertain interest in lands, made by livery and seisin only, or by parol, and not put in writing, &c., shall have the force and effect of leases or estates at will only; and excepts nevertheless all leases not exceeding three years from the making thereof, whereupon the rent reserved shall amount to two-thirds of the full improved value. The 4th section enacts, that ‘no action shall be brought whereby to charge the defendant upon any *contract or sale* of lands, or *any interest* in or concerning them, unless the agreement on which [68] such action shall be brought, or some memorandum thereof, be in writing.’ Is, then, the agreement on which this action is brought ‘*a contract and an interest in lands*?’ Inman v. Stamp(u) says distinctly *it is*: unless that case be successfully impeached, it must govern the present.”¹

(u) 1 Stark. 12, E. C. L. R. vol. 2.

¹ “The effect then,” said Bayley, J., in Edge v. Stafford, “of the Statute of Frauds, so far as it applies to parol leases, not exceeding three years from the making, is this, that the leases are valid, and

The last case provided for is that of *any agreement that is not to be performed within the space of one year from the making thereof*. It has been decided, that the *agreements* meant by this section are not *agreements* which may or may not happen to be performed within a year, but agreements which, on the face of them, contemplate a longer delay than a year before their accomplishment. *Peters v. Compton*,^(x) the case

(x) *Skinner*, 353; 1 *Smith L. C.* 143.

that whatever remedy can be had upon them in their character of leases, may be resorted to; but they do not confer the right to sue the lessee for damages for not taking possession."

Although the statute enacts that all leases by parol for more than three years shall have the effect of leases at will only, yet it has been held, on both sides of the Atlantic, that occupation and payment of rent under such a lease, will create a tenancy from year to year. *Clayton v. Blakey*, 8 Term. 3. And although the parol lease for more than three years is void under the statute, as to the *duration* of the term, yet the contract will regulate the terms of the holding in other respects, as, for instance, the amount of rent, &c. *De Medina v. Poulson*, 1 Holt, N. P. R. 47; *Richardson v. Gifford*, 1 Adol. & Ell. 52; *Beale v. Sanders*, 5 Scott, 58; *Schuyler v. Leggett*, 2 Cowen, 660; *Edwards v. Coleman*, 4 Wendell, 480; *Prindle v. Anderson*, 19 Id. 391; *Hollis v. Paul*, 3 Metcalf, 350; *M'Dowell v. Simpson*, 3 Watts, 135. But under the statute as expressed in Maine and Massachusetts, as all leases, unless they be written, are leases at will only, it has there been held that a tenancy created by parol, cannot, by occupation and payment of rent, be subsequently enlarged into a tenancy from year to year. *Ellis v. Paige*, 1 Pick. 43; *Hingham v. Sprague*, 15 Id. 102; *Kelly v. Waite*, 12 Id. 308; *Little v. Pallister*, 3 Greenleaf, 15; *Davis v. Thompson*, 13 Id. 214.

A recent English statute (8 & 9 Victoria, c. 106, § 3) has enacted that every lease required by law to be in writing, of any tenements or hereditaments, made after the 1st of October, 1845, shall be void at law unless made by deed; but Mr. Chitty has remarked of this, that it would probably receive the same construction as the section above referred to, as it would seem not unreasonable to hold that the provisions of the statute would be satisfied by restricting its effect to the avoidance of the lease, as a lease simply. *Chitty on Contracts*, 283, 4th Eng. Ed.

usually cited as establishing this distinction, affords also a very good illustration of it. It was an action upon an agreement, in which the defendant promised for one guinea to give the plaintiff ten on the day of his marriage. The case was tried before Lord Holt, who reserved the question, whether a writing was necessary, for the opinion of all the Judges, a majority of whom were of opinion, "that, where the agreement is to be performed upon a contingency, and it does not appear within the agreement that it is to be performed *after* the year, there a note in writing is not necessary, for the contingency might happen *within* the year; but *where it appears by the whole tenor [69] of the agreement that it is to be performed after the year, there a note in writing is necessary, otherwise not." There was a difference of opinion among the Judges in this case, and it is remarkable that Lord Holt himself differed from the majority. However, their construction has been frequently adopted since that time.

[Thus, in *Fenton v. Emblers*,^(y) in consideration that the plaintiff would be and continue his servant as long as they should both please, the defendant promised to leave her, by his last will, an annuity for her life; and it was considered that the statute did not apply, it not being expressly and specifically agreed that the agreement should not be performed within the year. In *Wells v. Horton*,^(z) which was a promise by a testator that his executor should, at his death, pay the plaintiff 10,000*l.*, it was held that no writing was required to prove it; and Best, C. J., said, the plain meaning of the words of the statute is confined to contracts which, by agreement, are not to be carried into execution within a year, and does not extend to

(y) 3 Burr. 1281.

(z) 4 Bing. 40, E. C. L. R. vol. 13.

such as may by circumstances be postponed beyond that period; otherwise, there is no contract which might not fall within the statute. *Souch v. Strawbridge*(a) was a case in which it was proved that there [*70] had been a *proposal that the plaintiff should keep an infant child for the defendant for one year, at 5s. a week, which he objected was too much for so young a child; and it was then settled that it should remain with the plaintiff till the defendant gave notice or should think proper. It remained with the plaintiff more than two years. The Court considered no writing to be necessary to prove the agreement; and Erle, J., said, the treaty certainly did contemplate the endurance of the contract for the child's maintenance beyond a year; but the ultimate contract was, that the period should be as long as the defendant should think proper.]

One consequence of this section is, that, if a servant be hired for a year, and the service is to begin at a future time, the agreement ought to be in writing, since it will not be performed within a year.(b)

[It has also been held, that where by the terms of the contract it was to last for a longer period than a year, a custom by which it might be put an end to by one of the parties within that period, does not take it out of the operation of the statute.(c) In like manner, an undertaking to pay an annuity for life must be in writing, although it may terminate by death within a year.(d)]

(a) 2 C. B. 808, E. C. L. R. vol. 52.

(b) *Bracegirdle v. Heald*, 1 B. & Ald. 722; *Snelling v. Lord Huntingfield*, 1 Cr. M. & R. 25; * *Giraud v. Richmond*, 2 C. B. 835, E. C. L. R. vol. 52; *Leroux v. Brown*, 22 L. J. (C. P.) 1.

(c) *Birch v. Earl of Liverpool*, 9 B. & C. 392, E. C. L. R. vol. 17.

(d) *Sweet v. Lee*, 4 M. & Gr. 452, E. C. L. R. vol. 43.

*[Where, however, all that is to be done by one party, as the consideration for what is to be done by others, actually is done within the year, the statute does not prevent that party suing the other for the non-performance of his part of the contract. Where the one has had the full benefit of the contract, the law will not permit the other to withhold the consideration. As, where a landlord had agreed to lay out 50% on improvements on the premises demised, and the tenant, in consequence, to pay 5% a year additional rent for the remainder of his term, of which there were several years, and the landlord laid out the 50% within the year, he was allowed to recover the additional rent, although the agreement was not in writing.(e)]¹

I have now gone through the five cases to which the 4th section of the Statute of Frauds applies, and in which it requires a written memorandum of the contract. There are one or two other cases of very considerable importance in practice on which I shall briefly observe in the next lecture, in which a writing is required by the express enactment of the legislature. Having mentioned them, I shall say something of the *consideration* upon which a simple contract may be

(e) *Donellan v. Reed*, 3 B. & Ad. 899, E. C. L. R. vol. 23; *Touch v. Strawbridge*, 2 C. B. 808, E. C. L. R. vol. 52; *Cherry v. Heming*, 4 Exch. 631.*

¹ It has been held in England that the words in the statute, "not to be performed," mean not to be performed *on either side*, that is, that an agreement does not come within the statute provided all that is to be done *by one of the parties* is to be done within a year. *Donellan v. Reed*, 3 Barn. & Ad. 899. There the defendant, who was the plaintiff's tenant under a lease of 20 years, promised, in consideration that the latter would lay out £50 in alterations, to pay an additional 5% annually, during the remainder of the term. The alterations were finished within the year, and to an action for the additional £5, the

grounded, and which is, as you are aware, an essential part of every such contract ; and then, having finished

[*72] *the remarks I had to make on Simple Contracts exclusively, shall resume the consideration of

defendant pleaded that the contract could not possibly be performed within a year, and therefore ought to have been written. But the Court held that as the contract was entirely executed on one side within the year, and as it was the intention of the parties, founded on a reasonable expectation, that it should be so, the Statute of Frauds did not apply. Mr. Smith has questioned the propriety of this decision as being opposed to *Peter v. Compton*, both in his notes to that case, in the *Leading Cases* (vol. i. p. 143), and in his "*Mercantile Law*" (p. 440), but in the very recent case of *Cherry v. Heming*, 4 *Exchequer*, 631, the facts and the decision were much the same as in *Donellan v. Reed*, and the Court, referring to the remarks of Mr. Smith, were of opinion that they were not sufficient to induce them to doubt the authority of that case. On this side of the Atlantic, the construction thus adopted, has been followed in some cases: *Holbrook v. Armstrong*, 1 *Fairfield*, 31; *Rake v. Pope*, 7 *Alabama*, 161; *Johnson v. Watson*, 1 *Kelly*, 348; but rejected in others: *Broadwell v. Gitman*, 2 *Denio*, 87; *Cabot v. Haskins*, 3 *Pick.* 83; *Lockwood v. Barnes*, 3 *Hill*, 128. The practical difference between these classes of cases may be thus explained. "It often happens," as was said in *Donellan v. Reed*, "in cases of a parol sale of goods, that they are not to be paid for in full till after the expiration of a longer time than a year, and surely the law would not sanction a defence on that ground, where the buyer had had the full benefit of the goods on his part." Under such circumstances, however, it cannot be doubted that although by the operation of the statute, the seller might fail to recover the price of the goods *by the terms of the contract*, he could not fail to recover upon a *quantum valebant*: *Poulter v. Killingbeck*, 1 *Bos. & Pull.* 397; *Earl of Falmouth v. Thomas*, 1 *Cromp. & Mees.* 109; *Teal v. Auty*, 2 *Brod. & Bing.* 99; *Philbrook v. Belknap*, 6 *Vermont*, 383; and the difference would therefore be, that under *Donellan v. Reed*, the plaintiff could recover merely upon proving the contract and its performance on his part, while under the opposite authorities, the benefit to the defendant must be shown.

The point decided in *Souch v. Strawbridge*, *supra*, viz., that the statute only applies where, from the terms of the agreement, the contract must necessarily extend beyond the year, was, long before that

the general law of contracts, and shall speak of the *competency* or *incompetency* of the contracting parties, and of *remedies* by which, in case of breach of contract, their performance is to be enforced.

decision, held the same way in *Thorne v. Fox*, 10 Johns. 244, where a promise was made by one of a congregation to pay the plaintiff, its pastor, two dollars a year for his services as such, and he sued for services rendered many years after, and it was held that the plaintiff having received his salary semi-annually, it must be presumed that such was the understanding at the time of the agreement, and hence the contract was not within the statute, because the plaintiff could have withdrawn at any time within the year, and yet recovered his services for the first six months. So in *Artcher v. Zeh*, 5 Hill, 200; and it seems, also, that whenever the time of the duration of the contract is to depend on the contingency of life, the contract need not be written: *Wells v. Horter*, 4 Bingham, 40; *Thompson v. Gordon*, 3 Strobhart, 197; *Bull v. M'Crea*, 8 B. Monroe, 422; as, for instance, a promise not to carry on the business of a livery-stable keeper, because the death of the contracting party might happen within the year: *Lyn v. King*, 1 Metcalf, 411; a promise to be performed on the death of the promisor: *Wells v. Horton*, 4 Bingham, 40; *Thompson v. Gordon*, 3 Strobhart, 197, &c.; because the death of the promising party might occur instantaneously. The student will find these and many other cases classified in the American note to *Peter v. Compton*, 1 Smith's Leading Cases, 375.—R.

SALE OF GOODS, ETC., UNDER THE 17TH SECTION OF THE STATUTE OF FRAUDS.—CONSIDERATION OF CONTRACTS BY DEED AND OF SIMPLE CONTRACTS.

I CONCLUDED in the last lecture the consideration of the five cases in which the 4th section of the Statute of Frauds renders it necessary that a contract should be reduced into writing. There are, as I then said, one or two other cases, which, being of constant occurrence, it will be right to specify before proceeding to the next branch of the subject.

The first of these cases is that of a sale for the price of 10*l.* or upwards, regarding which the 17th section of the Statute of Frauds has provided as follows :

“No contract for the sale of any goods, wares, or merchandises for the price of 10*l.* or upwards shall be good, except the buyer shall accept part of the goods so sold, and actually receive the same; or give something in earnest to bind the bargain, or in part payment; or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.”

[*74] [*As to the subject-matter of this section there is little difficulty in applying it; for the case of growing crops, and trees, and roots, &c., in the ground, the law has been already considered in treating of the 4th section; see page 60. It has been decided that shares in joint-stock companies are not

interest in land within the 4th section of the Statute of Frauds; nor are they goods, wares, or merchandizes within the 17th.(a)]

The first great difference which you will observe between this section and the 4th section of the same act is, that the 4th section renders a writing *necessary* in all cases which fall within its terms; whereas the 17th mentions three circumstances, any one of which if complied with shall be as effectual as a writing, namely, *acceptance of any part of the goods, payment of part of the price*, and lastly, *the giving something by way of earnest* to bind the bargain; any one of which three things will as effectually perfect the sale as a writing would. Where none of these has taken place, a writing,¹ however, becomes necessary; and if there

(a) *Humble v. Mitchell*, 11 A. & E. 205, E. C. L. R. vol. 39; *Radley v. Holdsworth*, 3 M. & W. 422;* *Bowlby v. Bell*, 3 C. B. 4, E. C. L. R. vol. 54; *Knight v. Barber*, 16 M. & W. 66;* *Empest v. Kilner*, 3 C. B. 249, E. C. L. R. vol. 54.

¹ Delivery to and acceptance by the agent of the vendee is sufficient. *Atwater v. Dodge*, 6 Wendell, 397. Aliter of an acceptance by a mere shopboy, out of the scope of his duty. *Smith v. Mason, Anthon*, 14.

Goods are received and accepted by the purchaser within the Statute of Frauds when they are transported by the seller to the place of delivery appointed by the agent who contracted for them, and are there delivered to another agent of the purchaser, and are by him shipped to a port where the purchaser had given him general directions to ship goods of the same kind. *Snow v. Warner*, 10 Metcalfe, 2. A delivery of goods by the vendor, on a parol sale, whether actual or constructive, and an acceptance by the vendee, is a performance of the contract, and the vendor cannot afterwards retract and void the sale as being within the Statute of Frauds. *Johnson v. Watson*, 1 Kelly, 348.

To constitute a delivery and acceptance of goods sold, within the meaning of the statute, something more than mere words is necessary.

be none, the bargain is void, and there is no sale: for, to use the words of Mr. J. Bosanquet, in *Laythoarp v. Bryant*, "the 4th section does not avoid contracts not [*75] signed in the manner described; it only precludes the right of action. The 17th section is stronger, and *avoids* contracts not made in the manner prescribed." A parol sale, therefore, unaided by any of the three formalities mentioned in the 17th section as equivalent to writing, is totally and entirely void. A doubt was entertained at one period whether the 17th section excluded the case of a contract for something not in existence in a chattel state at the time of making the bargain, but which was to become a chattel before the time agreed upon for its delivery. Where, for instance, growing timber was bargained for, to be delivered cut into planks, or a ship or carriage

There must be some act of the parties, amounting to a transfer of the possession, and an acceptance thereof by the buyer, and the case of cumbrous articles is not an exception to this rule. *Shindler v. Houston*, 1 Comstock, 261. Where, by the terms of an agreement for the sale and purchase of goods, cash is to be paid on the delivery of the goods, payment of the money is sufficient evidence that the goods have been delivered in pursuance of the contract, for the purpose of taking the case out of the Statute of Frauds. *Aguirre v. Allen*, 10 Barbour, S. C. 74.

See also upon the subject of acceptance of part, *Vincent v. Germond*, 11 Johns. 283; *Seymour v. Davis*, 2 Sandf. S. C. 239.

A contract to make machines for a specified price and find the materials, is not within the statute. *Spencer v. Cone*, 1 Metcalf, 283. If the articles exist at the time in the condition in which they are to be delivered, it should be regarded as a contract of sale; but if labor and skill are to be applied to existing materials, it is then a contract for the manufacture of such article. *Hight v. Ripley*, 1 App. 137; *Cummings v. Dinnett*, 26 Maine, 397; *Cason v. Cheely*, 6 Georgia, 554; *Seymour v. Davis*, 2 Sandf. S. C. 239; *Allen v. Jarvis*, 20 Conn. 38; *Bronson v. Wiman*, 10 Barbour, S. C. Rep. 406; *Hardell v. McClure*, 1 Chandler, 271.

not yet built.¹ However, any doubt that formerly existed on this subject is now put an end to; for, by sta-

¹ It was formerly held that *executory* contracts were not within the statute, but that it was confined to cases where the buyer was immediately answerable: *Towers v. Osborne*, Strange, 506; *Clayton v. Andrews*, 4 Burrow, 2101; but this distinction was doubted by Lord Thurlow, in 3 Brown's Cas. in Ch. 355, and was subsequently overruled. *Rondeau v. Wyatt*, 2 H. Black. 63; *Cooper v. Elston*, 7 Term. 14.

The statute of 9 Geo. 4 has not been generally re-enacted in this country, and hence the English cases upon the construction of this part of the Statute of Frauds before its alteration, have still a practical application here. The first case was *Towers v. Osborne*, already cited, where the defendant bespoke a chariot, and refused to take it when made, and the Court held that a writing was not necessary, for the statute "related only to contracts for the actual sale of goods, when the buyer is immediately answerable, without time given him by special agreement." Then came *Clayton v. Andrews*, *supra*, where the plaintiff agreed to deliver a load and a half of wheat within a month, at so much a load, to be paid on delivery, the wheat being then unthrashed, and the Court, on the authority of *Towers v. Osborne*, held the case not to be within the statute, rather, however, on the ground of the contract being executory, than because the wheat did not then exist in the form in which it was to be delivered. Then these two cases were, as has been said, overruled as to the distinction between executed and executory contracts. Then in *Garbutt v. Watson*, 5 Barn. & Ald. 613, 7 E. C. L. R., the contract was for the delivery of flour, which was then unground wheat, and the Court said that "in *Towers v. Osborne*, the chariot which was ordered to be made would never, out for that order, have had any existence. But here the plaintiffs were proceeding to grind the flour for the purposes of general sale, and sold this quantity to the defendant as part of their general stock. The distinction is indeed somewhat nice, but the case of *Towers v. Osborne* is an extreme case, and ought not to be carried further," and it was said that the question was whether the contract was for the sale of goods, or for work and labor and materials found; and the case of *Clayton v. Andrews*, which was scarcely distinguishable from the present one on this point, was said to have been also incorrectly decided upon the point of the condition of the wheat. Subsequent cases have held that contracts to sell oil not then expressed from seeds: *Wilks v. Atkinson*, 6 Taunton, 11; to supply a house with pipes to be laid in a

tute 9 Geo. 4, c. 14, s. 7, it is enacted that the 17th section of the Statute of Frauds "shall extend to all contracts

specified manner: *West Middlesex Co. v. Suwerkropp*, Mood. & Malk. 408; to make a copper-plate press to be ready in three months: *Pinner v. Arnold*, 2 Cr. Mees. & Rosc. 613, overruling *Buxton v. Bedell*, 3 East, 304, and the like, are within the statute, and must therefore be written; but a contract to deliver a quantity of oak pins, which were not then made, but were to be cut out of slabs, being merely an agreement for labor to be done upon materials found, was held not to be a "contract for the sale of goods," for the thing to be delivered did not exist *in solido*, and would be incapable of delivery. *Groves v. Buck*, 3 Maule & Selw. 178. In this country, the distinction between the contract being executed and executory has also been disregarded: *Bennett v. Hull*, 10 Johnson, 364; *Crookshank v. Burrell*, 18 Id. 58; *Jackson v. Covert*, 5 Wendell, 141; *Cason v. Cheely*, 6 Georgia, 554. As respects the condition of the subject of the contract, it has been truly said, that "the difficulty arises not so much from any uncertainty in the rule as from the infinitely various shades of different contracts. If it is a contract to sell and deliver goods, whether they are then completed or not, it is within the statute. But if it is a contract to make and deliver an article or quantity of goods, it is not within the statute;" per Shaw, C. J., in *Gardner v. Joy*, 9 Metcalf, 179; and the same Judge subsequently thus laid down the rule: "When a person stipulates for the future sale of articles, which he is habitually making, and which, at the time, are not made or finished, it is essentially a contract of sale, and not a contract for labor; otherwise, when the article is made pursuant to an agreement." *Lamb v. Crafts*, 12 Id. 356; *Cason v. Cheely*, 6 Georgia, 554. Thus, agreements to make the woodwork of a wagon, to be paid for in lambs at one dollar a head: *Crookshank v. Burrell*, 18 Johns. 58; to completely line with cloth selected by defendant, a buggy of which the body existed in an unfinished state: *Mixer v. Howarth*, 21 Pickering, 204; to make ten stave machines, and find the materials: *Spencer v. Cone*, 1 Metcalf, 283; to make twelve surgical adjusters, and find the materials: *Allen v. Jarvis*, 20 Connecticut, 38; to furnish, as soon as practicable, 1000 or 1200 malleable hoe shanks, agreeably to patterns furnished: *Hight v. Ripley*, 19 Maine, 137; were respectively held not to be contracts within the statute: see *Cummings v. Dennett*, 26 Id. 397; but a contract for the purchase of one hundred boxes of candles, the time of delivering not being mentioned, but the defendant stating that they were not yet manufac-

for the sale of goods of the value of 10*l.* sterling and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not, at the time of such contract, be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

Where a writing is relied on to satisfy the provisions of the 17th section, the rules which govern the case are very analogous to those which I have already stated with regard to the 4th. The signature must be by the party to be *charged* or his agent. [And one party cannot be the other's agent *for this purpose. (b) Nor can the agent of the party com- [*76]

(b) Wright v. Dannah, 2 Camp. 203; Farebrother v. Simmons, 5 B. & Ald. 333, E. C. L. R. vol. 7.

tured, but he would manufacture and deliver them in the course of the summer, was in a late case held to be a "sale of goods" within the statute. Gardner v. Joy, 9 Metcalf, 179. So of cider not yet manufactured: Seymour v. Davis, 2 Sandford's S. C. R. 241; wheat not yet thrashed: Downes v. Ross, 23 Wendell, 274; and cotton to be packed in bales: Cason v. Cheely, 6 Georgia, 554. In Maryland, in 1821, the case of Eichelberger v. M'Cauley, 5 Harris & John. 214, was for the delivery of unthrashed wheat, and on the authority of Clayton v. Andrews, the contract was held not to be within the statute, but the late authorities seem generally to agree in condemning the decision of that case, and say, moreover, of Towers v. Osborne, that it was rightly decided, but upon a wrong reason.

It has been held in England that contracts for the sale of shares in a joint stock, banking company, or in a railway company, or of foreign stock, need not be in writing, as not coming within the term, "goods, wares, or merchandise:" Humble v. Mitchell, 11 Ad. & Ell. 205; Bowbly v. Bell, 3 Com. Bench, 284, Id. 249; Duncroft v. Albrecht, 12 Simons, 189; Hazeltine v. Siggins, 1 Excheq. 867; but in Colvin v. Williams, 3 Harris & Johns. 38, and Tisdale v. Harris, 20 Pickering, 9, the statute was differently construed (in Gadsden v. Lance, 1 M'Mullan, Ch. 87, this point was left undecided), and in Baldwin v. Williams, 3 Metcalf, 365, the authority of Tisdale v. Harris was confirmed, and the statute held to apply also to sales of promissory notes.—R.

plaining of a breach of the contract signing a memorandum of the bargain at the request of the party to be charged, be considered as the agent of the party to be charged.(c)] But under neither the 4th nor the 17th sections is there any necessity for the agent's being appointed by writing.

Under the 17th section, too, as well as under the 4th, several documents may be read together as making up the contract, provided they be sufficiently connected in sense among themselves without the aid of parol evidence.(d) [And in such cases, as different phrases are commonly used in the different documents, it is peculiarly important to ascertain that both parties mean the same thing, as where there was a treaty for the sale of a horse, and one wrote that he would buy him if warranted sound and quiet in harness, and the other wrote that he would warrant him sound and quiet in double-harness, it was considered by the Court that the parties never had contracted in writing *ad idem*, and, consequently, that the statute had not been [*77] complied with.(e)] It was indeed said by Lord *Ellenborough, in *Egerton v. Matthews*,(f) that the word *bargain*, used in this section, does not render so strict a statement of the transaction necessary, as the word *agreement*, used in the 4th, does of matters within that section. It has, however, been decided that the names of both *parties* must appear in

(c) *Graham v. Musson*, 5 Bing. N. C. 603, E. C. L. R. vol. 35.

(d) *Smith v. Surman*, 9 B. & C. 561, E. C. L. R. vol. 17; *Dobell v. Hutchinson*, 3 A. & E. 355, E. C. L. R. vol. 30. See *Oldham v. Showler*, 3 C. B. 312, E. C. L. R. vol. 54; *Archer v. Baynes*, 5 Exch. 625; **Phillimore v. Barry*, 1 Camp. 513; *Jackson v. Lowe*, 1 Bing. 9, E. C. L. R. vol. 8.

(e) *Jordan v. Norton*, 4 M. & W. 155; **Hutchinson v. Bowker*, 5 M. & W. 535.*

(f) 6 East, 307.

the memorandum, though the signature of the party *to be bound* alone is requisite ; for, as the Court observed, there cannot be a *bargain* without two parties, and therefore a memorandum naming one only is not a memorandum of a bargain.(g) And the price ought to be stated, if one was agreed on, for that is part of the bargain.(h) If none be named, the parties must be understood to have agreed for what the thing is reasonably worth. Thus, an order for goods “on moderate terms” is a sufficient memorandum within the 17th section of the Statute of Frauds.(i)

[But although the statute invalidates all contracts for the sale of goods unless in writing, or unless the buyer accept the goods, or give earnest, or pay in whole or part, and therefore virtually and in effect forbids their being in any way varied or altered by parol ;(k) yet it does not forbid their *being rescinded by parol ; and there is no doubt that they may be so rescinded.(l)] [*78]

Another case, in which the legislature has required that a particular contract shall be in writing, is that of *an infant*. There are many contracts which, when entered into by an infant under the age of twenty-one years, are invalid, as I shall have occasion to explain to you at greater length when I arrive at that part of the subject which relates to the *competency* of parties to contracts, but which are capable of being ratified by the infant when he arrives at his full age of twenty-one.

(g) *Champion v. Plummer*, 1 B. & P. 252.

(h) *Elmore v. Kingscote*, 5 B. & C. 583, E. C. L. R. vol. 11.

(i) *Ashcroft v. Morrin*, 4 M. & Gr. 450, E. C. L. R. vol. 43.

(k) *Harvey v. Grabham*, 5 A. & E. 61, E. C. L. R. vol. 31 ; *Marshall v. Lynn*, 6 M. & W. 109 ;* *Stead v. Dawber*, 10 A. & E. 57 ; E. C. L. R. vol. 37.

(l) *Ibid.* See *Goss v. Lord Nugent*, 5 B. & Ad. 58 ; E. C. L. R. vol. 27.

This ratification might, at common law, have been by parol; but by 9 Geo. 4, c. 14, s. 5, no action shall be maintained whereby to charge any person upon any promise made *after full age* to pay any debt contracted *during infancy*, or upon any ratification after full age of any promise or simple contract made during infancy, *unless* such promise or ratification be in *writing*, signed by the party to be charged therewith. In the construction of this Act, [it has been considered, that any written instrument, signed by the infant who has attained his majority, will amount to a ratification of an act done by himself while an infant, provided it be such as, in the case of an adult, would amount to an adoption of the act, had it been that of an agent.(*m*) And, [*79] therefore, where the defendant *wrote to the plaintiff thus:—"I am sorry to give you so much trouble in calling, but am not prepared for you, but will without neglect remit you in a short time," but the note contained no address, date, or amount, it was held to be sufficient, and that these omitted parts might be supplied by parol.(*n*) It is worthy of being observed, that this statute seems to exclude the signature of an agent, and to require that of the infant himself.(*o*)]

[All contracts of insurance must also be printed or written, whether the contract be a marine, fire, or life insurance.(*p*)]

Another case is that of a promise to pay a debt barred by the Statute of Limitations; but, as I shall have

(*m*) *Harris v. Wall*, 1 Exch. 122.*

(*n*) *Hartley v. Wharton*, 11 A. & E. 934, E. C. L. R. vol. 39; *Hunt v. Massey*, 5 B. & Ad. 902, E. C. L. R. vol. 27.

(*o*) *Hyde v. Johnson*, 2 Bing. N. C. 776, E. C. L. R. vol. 29.

(*p*) 35 Geo. 3, c. 63, s. 2. See 14 Geo. 3, c. 78, and 14 Geo. 3, c. 48.

occasion to speak again of that statute before the conclusion of these Lectures, I shall reserve what I have to say regarding the writing by which its operation may be defeated.

Now, these are the principal cases in which the law of England requires that particular contracts should be reduced into writing; not that they are the only ones, for there are many statutes making writing necessary in certain particular transactions, but these are the cases of most frequent occurrence, and therefore fit-test, to be here mentioned.

*Having now, therefore, pointed out to you the practical distinction which exists between written and verbal contracts, though both of them alike, if not sealed and delivered, rank but as *simple contracts*, it is time to touch on some points which apply to all simple contracts alike.

[The first point to be remarked will perhaps, at first sight, be considered as nearly self-evident, but much difficulty does, in fact, arise from not attending to it; and, upon a little consideration, it will appear important to be borne in mind: it is this, that the parties to the contract must mutually assent to the same thing. (q)]

“A contract,” says Pothier, “includes a concurrence of intention in two parties, one of whom promises something to the other, who on his part accepts such promise.” Hence, assent or acceptance is indispensable to the validity of every contract; for, “as I cannot,” continues Pothier, “by the mere act of my own mind transfer to another a right in my goods, without a concurrent intention on his part to accept them, neither can I by my promise confer a right against my person

until the person to whom the promise is made has, by his acceptance of it, concurred in the intention of acquiring such right." Wherever there is not an assent, express or implied, to the terms of the proposed contract by both parties, there is no mutuality, and no contract.

[*81] *The assent to a contract must be to the precise terms offered. Where one party proposes a certain bargain, and the other agrees subject to some modification or condition, there is no mutuality of contract until there has been an assent to it so modified; otherwise it would not be obligatory on both parties, and would therefore be void.^(r) There is a clear distinction between a mere proposal and an agreement to sell. The case of *Routledge v. Grant*^(s) is also a good example of this principle. Grant offered to purchase Routledge's house, requiring possession on the 25th of July, and a definite answer in six weeks; Routledge accepted the offer, with possession on the 1st of August; Grant afterwards, within the six weeks, retracted his offer, and it was held that he had a right to do so.

The party who made the offer has a right to say, "*Non hæc in fœdera veni;*" and to decline any other bargain than that which he offered. Where an offer is accepted in the terms in which it was made the contract is binding on both parties. At any time before it is accepted the offer may be rescinded, but not afterwards.^(t) The importance of ascertaining accurately that the offer which the one party has made has not been altered by any term or stipulation introduced by the other in *accepting it, has been strongly

[*82] shown in many recent cases on contracts for the

(r) *Jordan v. Norton*, 4 M. & W. 155; **Cooke v. Oxley*, 3 T. R. 653.

(s) 4 Bing. 653, E. C. L. R. vol. 13.

(t) *Cooke v. Oxley*, 3 T. R. 653.

purchase of railway scrip. These contracts were very frequently made by letters, the intended purchaser applying by letter for shares, and the answer, after complying with this request, going on to stipulate that the shares should not be transferable, or adding some term not contemplated by the applicant.^(u) Thus, the intended allottee offered to buy and to pay for his shares; but the allotters added a proviso. To this additional stipulation there was often no assent, and the contract was therefore void; and no such allottee could have been sued upon the transaction, for the stipulation was clearly not implied in the agreement to take the shares. Pothier says, "the allowance of a certain time for paying money due, the liberty of paying it by instalments, &c., and the like, are *accidental to the contract*, because they are not included in it without being particularly expressed."^(v)

I have already stated to you that one of the main distinctions between a contract by *deed* and a simple contract is that *the latter requires a consideration to support it*, the former not. And here it is proper to observe, incidentally, that, when I say that a contract by deed does not require a *consideration to support it, I [*83] mean to say that it does not require a consideration for the purpose of binding the party who executes it, and rendering him liable. I do not by any means intend that you should understand that a consideration may not come to be a most important ingredient in a contract by deed, as between parties claiming a benefit under that deed and other parties having conflicting claims upon the person executing it. For in-

(u) *Duke v. Andrews*, 2 Exch. 290; * *Chaplin v. Clarke*, 4 Exch. 403; * *Re Direct Birmingham Railway Co.*, Ex parte Capper, 19 L. J. (Chanc.) 394.

(v) 1 Evans' Pothier, 7.

stance, the statute of the 13th Eliz. c. 5, renders a great variety of deeds (if made without a valuable consideration) void as against creditors; and this statute (which Lord Mansfield has said is only declaratory of the Common Law) is founded on a perfectly righteous and equitable principle: for how absurd and unjust would it be to allow a man to defeat the claim of his real creditors by entering into obligations to persons who had never parted with any value at all. When, therefore, I say that a deed is good *without consideration*, I do not mean to say that it stands for all purposes on the same footing as an instrument for which value has passed; but what I mean that you should understand is this—that, where the interests of third parties are not affected, but the question is between the person who entered into the contract and the person with whom it is made, there a man cannot defend himself against a promise made by deed, by saying that he received no consideration for it, although he might defend [*84] himself upon that *ground against the very same promise if it had been made by simple contract. I cannot, I think, put a better example of this than that which I put in a former lecture:—*A. owes B. 50l.* Now if I write upon a piece of paper as follows:—

“I promise *A.* that I will discharge for him the debt due from him to *B.*,”

and give him the paper so written, here is a simple contract without any consideration for it; and, if I fail to perform the promise, no action will lie against me, because a simple contract founded upon no consideration cannot be enforced: and yet, if I had sealed that very slip of paper, and delivered it to *A.* as my act and deed, an action of covenant would have lain against me had I afterwards failed in performing it; and to

that action it would have been no defence to say that I received no consideration for my undertaking: I might say, that I had been imposed upon, and persuaded to execute it by *A.*'s fraud; or I might say, that the debt due to *B.* was an illegal one, and that my promise was made in pursuance of an illegal arrangement; but that the promise was without consideration would be a defence of which, the contract being by deed, I could not be allowed to avail myself.¹

Here I am tempted to digress for a moment or two from the main course of the subject, for the imaginary case I have first put reminds me of a *real and [*85] very curious point which has been recently decided in the Court of Queen's Bench. The case I put, you will observe, was this:—*A.* owes *B.* 50*l.* I write and sign a sheet of paper in these words:—

“I promise *A.* to discharge *the debt due from him to B.*”

Now this promise, if I have received no consideration for it, is, as I have said, merely void. But suppose I *have* received a consideration for it,—will it be binding on me then? Suppose, for instance, *A.* has given me a horse or a diamond ring as a consideration for my undertaking the responsibility,—can my promise be enforced even in that case? Now, at the first statement of the question, I dare say that you feel surprise that it ever should have been made a question at all; but a moment's reflection will suffice to show you why it was not only a question, but a very doubtful one. The 4th section of the Statute of Frauds, you will remember, among the five sorts of *agreement* which it

¹ It has been before stated, that in some of the United States, the obligor of a specialty is, by statutory enactment, permitted, under some restrictions, to show its failure, as, at common law, he could its illegality for want of consideration.—R.

directs should be evidenced by writing, comprehends *any promise to answer for the debt of another*. Now in the case I have been putting there is a debt due from *A.* to *B.*, and my promise is a promise to *A.* to pay it; and, though I have supposed the promise to be in writing, and signed, and to be founded upon a sufficient consideration—say the horse or the ring—still it [*86] is not such a writing as **would* satisfy the Statute of Frauds, for that writing, as I showed you in a former lecture from the authorities, must show the consideration as well as the promise; and in the case which I have put, the writing simply contains a signed promise to *A.* to discharge his debt to *B.*, but neither expressly nor impliedly mentions or alludes to any consideration at all. If, therefore, the case be within the Statute of Frauds, no action is maintainable upon that promise, although founded upon a good and valuable consideration; so that the question, you see, reduces itself simply to this point,—is such a promise, that is, is a promise to pay another man's debt, made, not to the person to whom it is due, but to the debtor himself, a promise to answer for the debt of another within the *meaning* of the 4th section of the Statute of Frauds,—I say, within the *meaning*, for that it comes within the *words*, literally understood, is obvious.

It is a singular thing that this question never should have received a judicial decision until it came before the Court of Queen's Bench a short time since, in the case of *Eastwood v. Kenyon*, which is now reported in 11 Ad. & Ell. 438. In that case, the plaintiff was liable to a Mr. Blackburne on a promissory note, and the defendant promised *the plaintiff* to discharge the note to Blackburne. The Court held, that this was not a promise to answer for the debt of another within the meaning of the 4th section of the Statute of Frauds.

*“ If,” said Lord Denman, “ the promise had been made to Blackburne, doubtless the statute [*87] would have applied; it would then have been strictly a promise to answer for the debt of another: and the argument on the part of the defendant is, that it is not less the debt of another because the promise is made to that other, viz. the debtor and not the creditor, the statute not having in terms stated to whom the promise contemplated by it is to be made. But, upon consideration, we are of opinion, that the statute applies only to promises made to the person to whom no other is answerable. We are not aware of any case in which the point has arisen, or in which any attempt has been made to put that construction upon the statute which is now sought to be established, and which we think not to be the true one.”¹

To return to the subject from which I digressed for the purpose of mentioning this point, and the decision upon it.—A simple contract is, as I have said, incapable of becoming the subject of an action unless supported by a consideration. *Ex nudo pacto non oritur actio* is an old and well-established maxim of our law, as well as of the civil law, and has been illustrated by a great variety of cases from time to time: thus it has been laid down by Lord Kenyon,(x) that a promise

(x) *Harris v. Watson, Peake, 72; Harris v. Carter, 23 L. J. (Q. B.) 35.*

¹ “ The statute applies only,” said Parke, B., in the recent case of *Margreaves v. Parsons*, 13 Mees. & Wels. 569, “ to promises made to the persons to whom another is already, or is to become answerable. There must be a promise to be answerable for a debt of, or a default in some duty by that other person towards the promisee. This was decided, and no doubt rightly, by the Court of Queen’s Bench, *Eastwood v. Kenyon*,” and the same point had been previously decided by the Supreme Court of New York, in *Johnson v. Gilbert*, 4 Hill, 18.—R.

made by the captain of a ship to one of his seamen, [*88] when *the ship was in extraordinary danger, to pay him an extra sum of money as an inducement to extra exertion, was a void promise; because every seaman is bound to exert himself to the utmost for the safety of the ship, and therefore the captain would get nothing from the seaman in exchange for his promise except that which the seaman was bound to do before.¹ [And very recently the Court of Exchequer has held, that interest, being by mercantile usage payable upon balances, an agreement in consideration of interest upon a balance to give an extended time for paying it, was merely void. (y) The documents put in by the defendant, said Parke, B., show that interest was payable at the time of the contract, and therefore there was no consideration for that contract.]

The reason for the strictness with which this rule of law—that there must be a consideration to support a simple contract—is enforced, is, to guard persons against the effects of their own improvidence in entering hastily and inconsiderately into engagements which may prove ruinous to them. The law does not absolutely prohibit them from contracting a gratuitous obligation, for they may, if they will, do so by deed; and it is thought, that, a deed being an instrument requiring more of ceremony and formality [and sealing being considered all over Christendom as an [*89] act of much *solemnity], more opportunity for reflection is afforded to the party executing it than to a person entering into a simple contract, and,

(y) *Orme v. Galloway*, 23 L. J. (Exch.) 118.

¹ And to the same effect were *Newman v. Walters*, 3 Bos. & Pul. 612; *Stilk v. Myrick*, 2 Camp. 317; *Smith v. Bartholomew*, 1 Metcalf, 278.—R.

consequently, that it is not unreasonable to attribute to it a more stringent operation.

The reason of the law of England on this point—one of the most important in our entire system—is exceedingly well explained in the judgment of the Court of Queen's Bench in *Eastwood v. Kenyon*, the case which I before mentioned with reference to the 4th section of the Statute of Frauds.

The Lord Chief Justice remarks, in that case, that ‘the eminent counsel who argued for the plaintiff in *Lee v. Muggeridge*,^(z) (and who were the present Lord Winford and Mr. Serjt. Lens), had spoken, in their argument, of Lord Mansfield as having considered the rule of *nudum pactum* too narrow, and maintained, that all promises deliberately made ought to be binding at law, as they certainly are in honor and conscience. But,” his Lordship continues, “the enforcement of such promises at law, however plausibly recommended by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society—one of which would be the frequent preference of voluntary undertakings to claims for just debts.¹ Suits would thereby be *multiplied, and voluntary undertakings would be

[*90]

(z) 5 Taunt. 36, E. C. L. R. vol. 1.

¹ Thus services voluntarily done by one for another, without his rivity or consent, afford no ground for an action, however meritorious they may be, as, for instance, in saving his property from fire: *Bartholomew v. Jackson*, 2 Johns. 38; or by doing additional work to a particular job. *Hart v. Norton*, 1 M'Cord, 22.—R.

When, however, an actual benefit is derived from the unsolicited services of another, it creates a moral obligation of sufficient potency to sustain an express promise. *Greeves v. M'Allister*, 2 Binn. 591; *Lark v. Herring*, 5 Ibid. 33; *Nesmith v. Drum*, 8 Watts & Serg. 9; *Unningham v. Garvin*, 10 Barr, 366.

also multiplied, to the prejudice of real creditors. The temptations of executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult."

Now, with regard to the question—*What does the law of England recognize as a consideration capable of supporting a simple contract?* The best and most practical answer is,—*Any benefit to the person making the promise, or any loss, trouble, or any inconvenience to, or charge upon, the person to whom it is made.* Sir Wm. Blackstone, indeed, in the 2d vol. of his Commentaries (p. 444), following the arrangement of the civilians, divides Considerations into four classes: 1st. *Do ut des*, where I give something that something may be given to me; 2d. *Facio ut facias*, where I do something that something may be done for me; 3d. *Facio ut des*, where I do something that something may be given to me; and 4th. *Do ut facias*, where I give something that something may be done for me. Divisions of this sort are useful for the sake of arranging our ideas, and testing their clearness: but the short practical rule is, as I have said, that *any benefit accruing to him who makes the promise, or any loss, trouble or disadvantage undergone by, or charge imposed upon, him to whom it is made,* is a sufficient consideration in the eye [91] of the law to sustain the promise. Thus, let us suppose I *promise to pay B. 50*l.* at Christmas. Now, there must be a consideration to sustain this promise. It may be that B. has lent me 50*l.*: here is a consideration by way of advantage to me. It may be that he has performed, or has agreed to perform, some laborious service for me: if so, here is a consideration by way of inconvenience to him, and of advantage to me at the same time. It may be that he is to labor for a third person at my request; here will be incon-

venience to him without advantage to me : or, it may be that he has become surety for some one at my request : here is a charge imposed upon him. Any of these will be a good consideration to sustain the promise on my part. That this is the true rule of the law of England, you may collect from various instances, among which I will refer you to *Williamson v. Clement*,^(a) the judgment of the Lord Chief Justice in *Willatts v. Kennedy*,^(b) and the observations of Lord Ellenborough in *Bunn. v. Guy*.^(c)

[This consideration, however, must proceed from the party to whom the promise is made. If it proceed from some third person, not in any way moved or affected by the promisee, the latter is a stranger to the consideration, and a promise made to him is *nudum pactum*. Thus, in the case of *Thomas v. Thomas*,^(d) where an action was brought *upon an agree- [*92] ment between the executor of A. B. and the widow of the testator, which set out that the testator had declared his wish that his widow should enjoy certain premises for her life, and that it was agreed, in consideration of such desire and of the premises, that the executor should convey them to the widow, provided she should pay 1*l.* towards the ground rent of those and certain other premises, and keep the premises conveyed in good repair ; and it was contended, that the real consideration of the executor's promise was the desire to comply with the wish of the testator. The Court considered this no part of the consideration. "Consideration," said Mr. Justice Patteson, "means something

(a) 1 Taunt. 523.

(b) 8 Bing. 5, E. C. L. R. vol. 21.

(c) 4 East, 190.

(d) 2 Q. B. 851, E. C. L. R. vol. 42. See *Price v. Eaton*, 4 B. & Ad. 433, E. C. L. R. vol. 24.

which is of some value in the eyes of the law moving from the plaintiff. It may be of some benefit to the plaintiff, or some detriment to the defendant, but, at all events, it must be moving from the plaintiff. Now, that which is suggested as the consideration here, a pious respect for the wishes of the testator, does not in any way move from the plaintiff; it moves from the testator, and therefore, legally speaking, it forms no part of the consideration.”]

Provided there be some *benefit* to the contractor, or some *loss, trouble, inconvenience, or charge* imposed upon the contractee, so as to constitute a *consideration*, the Courts are not willing to enter into the question whether that consideration be *adequate* in value to the [*93] thing which is promised in *exchange for it.’ Very gross inadequacy, indeed, would be an index

¹ Hubbard v. Coolidge, 1 Metcalf, 93; Osgood v. Franklin, 2 Johns. Ch. 23, S. C. 14 Johns, 527; Bedel v. Loomis, 11 New Hamp. 9. “If a contract is deliberately made without fraud,” said Wilde, J., in Train v. Gold, 5 Pick. 384, “and with a full knowledge of all the circumstances, the least consideration will be sufficient.” R.

“A consideration is sufficient,” says Judge Rogers, in Hind v. Holdship, 2 Watts, 104, “if it arise from any act of the plaintiff, from which the defendant or a stranger derives any benefit, however small, if such act is performed by the plaintiff with the assent, express or implied, of the defendant; or by reason of any damages or any suspension or forbearance of the plaintiff’s right at law or in equity; or any possibility of loss occasioned to the plaintiff, by the promise of another; although no actual benefit accrues to the party promising. It is not essential that the consideration should be adequate in point of actual value. The law does not weigh the quantum of consideration, having no means of deciding on that matter; and it would be unwise to interfere with the facility of contracting, and the free exercise of the judgment and will of the parties. The law allows them to be the sole judges of the benefits to be derived from their bargains, provided there be no incompetency to contract, and the agreement violates no rule of law. There is no case where mere inadequacy of price, independent of other circumstances, has been held sufficient to set aside a contract between parties standing on equal ground, and dealing with

of fraud, and might afford evidence of the existence of fraud ; and fraud, as I have already stated to you, is a ground on which the performance of any contract may be resisted. But, if there be no suggestion that the party promising has been defrauded or deceived, the Court will not hold the promise invalid upon the ground of mere *inadequacy* ; for it is obvious, that, to do so would be to exercise a sort of tyranny over the transactions of parties who have a right to fix their own value upon their own labor and exertions, and would be prevented from doing so were they subject to a legal scrutiny, on each occasion, on the question whether the bargain had been such as a prudent man would have entered into. Suppose, for instance, I think fit to give 1000*l.* for a picture not worth 50*l.* ; it is foolish on my part : but, if the owner do not take me in, no *injury* is done. I *may* have my reasons. Possibly, I may think that I am a better judge of paintings than my neighbors, and that I have detected in it the touch of Raphael or Correggio. It would be hard to prevent me from buying it, and hard to prevent my neighbor from making the best of his property, provided he do not take me in by telling me a false story about it. Accordingly, in the absence of fraud, mere inadequacy of consideration is no ground for avoiding a contract. You will see two remarkable instances of this in the recent cases of **Bainbridge v. Firmston*,^(e) and *Wilkinson v. Olivèira*,^(f) [in the ^[*94]

(e) 8 A. & E. 743, E. C. L. R. vol. 35.

each other without any imposition or oppression. And the inequality," says Chancellor Kent, in *Osgood v. Franklin*, "amounting to fraud, must be so strong and manifest, as to shock the conscience and confound the judgment of any man of common sense." *Troy Academy v. Nelson*, 24 Vermont, 189 ; *Robinson v. Threadgill*, 13 Iredell, 39 ; *Brown v. Budd*, 2 Carter, 442 ; *Tompkins v. Phillips*, 12 Georgia, 52.

former of which the defendant, in consideration that the plaintiff had consented to allow the defendant to weigh certain boilers of the plaintiff, promised to deliver up the boilers in the same condition as when he received that consent; and the Court held that the consideration was sufficient to sustain the promise: and in the latter] the defendant promised to give the plaintiff 1000*l.* for the use of a letter which contained matters explanatory of a controversy in which he was engaged, and the consideration was held not to be inadequate to support the promise.

There is an old case upon this subject, involving so singular a state of facts that I cannot forbear mentioning it. It is called *Thornborow v. Whiteacre*, and is reported 2 *Ld. Raym.* 1164.

It was an action in which the plaintiff declared that the defendant, in consideration of 2*s.* 6*d.* paid down, and 4*l.* 17*s.* 6*d.* to be paid on the performance of the agreement, promised to give the plaintiff two grains of rye corn on Monday the 29th of March, four on the next Monday, eight on the next, sixteen on the next, thirty-two on the next, sixty-four on the next, one hundred and twenty-eight on the next, and so on for a year, doubling, on every successive Monday, the quantity delivered on the last Monday.

The defendant demurred to the declaration; and, [*95] *upon calculation, it was found that, supposing the contract to have been performed, the whole quantity of rye to be delivered would be 524,288,000 quarters, so that, as Salkeld the reporter, who argued the demurrer, remarked, all the rye grown in the world would not come to so much. But the Court said, that though the contract was a foolish one, it would hold at

law, and that the defendant ought to pay something for his folly.¹ The case was ultimately compromised. I presume, however, that if instead of demurring, the defendant had pleaded that he had been induced to enter into the contract by fraud, he would have been able to sustain his plea : since it seems obvious, on the face of the thing, that the plaintiff was a good arithmetician, who by a sort of catch, took in a man unable to reckon so well. Probably, the plaintiff had taken his hint from the old story regarding the invention of the game of chess. But, by demurring, the defendant admitted that there was no fraud, and, consequently, the only question was on the validity of the contract in the absence of fraud, so that the case presents a strong example of the reluctance of the Courts to enter into a question as to the adequacy of consideration. This reluctance is also very strongly exemplified by some late cases turning on contracts in restraint of trade. By the law of England, a contract in general restraint of trade is void ; but if in partial restraint of trade only, it may be supported, *provided the restraint be reasonable, and the contract founded on a [*96] consideration. And it was once laid down that the consideration must be *adequate*, and that the Court would enter into the question of adequacy. However, they have lately decided that they ought not to do so. These cases are particularly strong, for they are cases in which, contrary to the general rule of law, a consideration is required, even though the contract be by deed. I shall have occasion to mention them again in a sub-

¹ So in the old case in which the horse was sold for one barley-corn for the first nail in the horse's shoe, two for the second, and so on, doubling on each nail, the jury found, under the direction of the Court, for £8, the value of the horse. *James v. Morgan*, 1 Lev. 111.—R.

sequent lecture. At present, I will merely refer to the recent decisions. *(g)*

The consideration must, nevertheless, be of some value in contemplation of the law; for instance, if a man make an estate at will in favor of another, this is an insufficient consideration, for he may immediately determine his will; *(h)* neither is the termination of disputes about debts an adequate consideration, for there may be no debt actually due. *(i)* [And, in a very recent case, where a son had given to his father a promissory note, and, to an action brought by the father [*97] against him upon it, pleaded *that he had just ground to complain of the distribution which the father had made of his property, as the father had admitted; and that it was thereupon agreed between them that the son should cease forever to make any such complaint; and that the father would discharge him from liability on the note, and the cause of action in respect thereof; and that such agreement should be accepted in satisfaction of the note: the Court of Exchequer clearly held, that there was no consideration for the agreement of the father. *(k)*]

I think that I have now sufficiently explained what it is that the law recognizes as a consideration sufficient to support a promise without deed. I must not, however, conclude without noticing one class of cases which

(g) *Hitchcock v. Coker*, 6 A. & E. 439, E. C. L. R. vol. 33; confirmed by *Proctor v. Sargent*, 2 M. & Gr. 20, E. C. L. R. vol. 40; and *Green v. Price*, 13 M. & W. 698; * per Parke, B. 16 M. & W. 346, * S. C. in error; *Archer v. Marsh*, 6 A. & E. 959, E. C. L. R. vol. 33; and *Leighton v. Wales*, 3 M. & W. 545.*

(h) 1 Roll Abr. 23, pl. 29.

(i) *Edwards v. Baugh*, 11 M. & W. 641.* See also *Clutterbuck v. Coffin*, 3 M. & Gr. 842, E. C. L. R. vol. 42; and *England v. Davidson*, 11 Ad. & E. 856, E. C. L. R. vol. 39.

(k) *White v. Bluett*, 23 L. J. (Exch.) 36.

form a species of exception to the rule that a simple contract requires a consideration to support it. I allude to the case of a negotiable security, a bill of exchange, or promissory note. These, not being under seal, are simple contracts; but there is this marked distinction between the situation in which they and that in which any other simple contract stands, namely, that they are always presumed to have been given for a good and sufficient consideration, until the contrary is shown. And even if the contrary *be* shown, still, if the holder for the time being have given value for the instrument, his right to sue on *it cannot be taken away by showing that the per- [*98] son to whom it was originally given could not have sued, unless, indeed, something further be shown affecting his personal right, as that he had knowledge of the circumstances, or that he took the security when overdue, which is a sort of constructive notice, and places him in the same situation as the party from whom he took it. But so long as nothing of that sort appears, every note and acceptance is *prima facie* taken to have been given for good consideration, and every indorsement to have been made on good consideration. See the cases collected, Byles on Bills, last ed.; Bayley on Bills, by Dowdeswell; and Smith's Mercantile Law, last ed., by Dowdeswell.

CONSIDERATION OF SIMPLE CONTRACTS.—EXECUTED CONSIDERATIONS.—WHERE EXPRESS REQUESTS AND PROMISES ARE OF AVAIL.—MORAL CONSIDERATIONS.—ILLEGAL CONTRACTS.—RESTRAINTS OF TRADE.

I ENDEAVORED to explain in the last lecture what it is that the law of England recognizes as a consideration sufficient to support a promise without deed. I stated that any benefit to the person who makes the promise, or any loss, trouble, or disadvantage undergone by or charge imposed upon the person to whom it is made, will satisfy the rule of law in this respect. In order to render this as clear as possible, I am about, before proceeding to the next branch of the subject, to illustrate it by mentioning one or two decided cases, in which certain considerations have been held sufficient to support the promises founded on them.

It has been frequently decided, that, if one man have a legal or an equitable right of suit against another, his forbearance to enforce that legal or equitable right of suit is a sufficient consideration for a promise either by the person liable to him or any third person, either to satisfy the claim on which that right of suit is founded, or to do some *other and collateral

[*100] act. Thus, where (a) the plaintiff in an action of assumpsit stated in his declaration that he was the assignee of a bond for 72*l.* 2*s.* 6*d.*, in which the defendant was the obligor, and that, in consideration that the plaintiff would receive payment on certain

(a) *Morton v. Burn*, 7 A. & E. 19, E. C. L. R. vol. 34.

specified days, and forbear proceeding in the meanwhile, the defendant had promised to pay on those days. After a verdict for the plaintiff, it was objected, in arrest of judgment, that there was no consideration for the promise; for that, if an action had been brought in the name of the obligee of the bond, the agreement of the assignee to forbear would have been no defence (upon a ground which I have already sufficiently explained, namely, that an obligation by deed cannot be discharged by an agreement without deed). The Court, however, decided that the consideration was sufficient; "for," (said the Lord Chief Justice,) "although the agreement to forbear would not be pleadable to an action in the name of the obligee, yet, unless the plaintiff *did* forbear according to his agreement, he would not be able to sue on the defendant's promise." Thus again, where (b) the plaintiff, who had been appointed by the Court of Chancery a receiver of the debts and moneys of a firm, agreed to give time of payment to a person who owed money to the firm, in *consideration of which a third [*101] person promised to guarantee the debt; in an action against that third person, it was objected that there was no sufficient consideration for his promise; the Court of Common Pleas, however, decided that there was. (c). In another case the plaintiff had obtained judgment against Elizabeth Mackenzie for 57*l.* debt, and 65*s.* costs; and, in consideration that the plaintiff would forbear to execute a fieri facias on her goods, the defendant undertook to pay him 107*l.* in three days. It was objected, that there was no consideration, or, at least, no sufficient consideration; but

(b) Willatts v. Kennedy, 8 Bing. 5, E. C. L. R. vol. 21.

(c) Parker v. Leigh, 2 Stark. 229, E. C. L. R. vol. 3; Atkinson v. Bayntun, 1 Bing. N. C. 444, E. C. L. R. vol. 27.

Lord Tenterden said, "It is true the plaintiff might not perhaps have been entitled to recover to the full extent of 107*l.*, though it is to be observed, he might have levied the costs of the execution in addition to the sum given by the verdict. But he had a right at least to levy 60*l.*; and if, in consideration of his forbearing that, the defendant promised to pay him the larger sum; if the inconvenience of an execution against these goods at the time in question was so great, that the defendant thought it proper to buy it off at such an expense, I do not see that the consideration is insufficient for the promise."(*d*)¹

[*102] And where a man who has a judgment debt *takes from his debtor a promissory note for the amount, payable at a certain future time, it must be inferred that he thereby enters into an agreement to suspend his remedy for that time, and if so, that is a good consideration for the giving of the note.(*e*)

(*d*) *Smith v. Algar*, 1 B. & Ad. 603, E. C. L. R. vol. 20.

(*e*) *Baker v. Walker*, 14 M. & W. 465.* See *Tempson v. Knowles*, 7 C. B. 651, E. C. L. R. vol. 62; *Wilson v. Bevan*, 7 C. B. 673, E. C. L. R. vol. 62.

¹ Forbearance to sue or proceed, has always been held a sufficient consideration. *Hamaker v. Eberley*, 2 Binney, 506; *Johns v. Potter*, 5 Serg. & Rawle, 519; *Lonsdale v. Brown*, 4 Wash. C. C. Rep. 148; *Clark v. Russell*, 3 Watts, 213; *Downing v. Funk*, 5 Rawle 69; *Silvis v. Ely*, 3 Watts & Serg. 420; *Kean v. McKinsey*, 2 Barr, 30; *Dundas v. Sterling*, 4 Barr, 73. But if the creditor has not the legal right to sue, at any time during which he promises to forbear suit, the promise to pay in consideration of such forbearance is without consideration, and consequently void. *Martin v. Black*, 20 Alabama, 309.

In *Caldwell v. Heitsher*, 9 Watts & Serg. 51, the term "further forbearance," as the consideration expressed in a written guarantee, was construed to mean forbearance, for a convenient or reasonable time, taking into view in its computation as an element the period which had heretofore been permitted to elapse, without enforcing payment; and what is a reasonable or convenient time, the Court must determine.

The proposition thus illustrated will appear still clearer if we consider that the forbearance to prosecute an action is not a valid consideration for a promise to pay a sum of money to the plaintiff, unless there be a good cause of action. Thus, (f) where issue had been joined in a previous action for the recovery of a sum of money from the defendant, who had thereupon promised to pay the money and costs, in consideration that the plaintiff would forbear further proceedings; an action having been brought upon this promise, the defendant pleaded that the plaintiff never had any cause of action against the defendant in respect of the subject-matter of the said action. "To that," said Tindal, C. J., in giving judgment, "the plaintiff has demurred, and, doing so, admits the statement contained in it, that he had no cause of action in the original suit, to be true. Having made that admission, it appears to me that he is estopped from saying that there was any valid consideration for the defendant's promise. *It is almost *contra bonos mores*, and certainly [*103] against all legal principle, that, when a man knows that he has no cause for it, he should still persist prosecuting in an action. Then, in order to establish a binding promise, the plaintiff must show a consideration for it consisting of something which is either beneficial to the defendant, or detrimental to the plaintiff. It cannot, however, be said that the foregoing of such an action can be regarded by a Court as beneficial to the defendant, because he thereby saves the risk of defeat, and the extra costs which he would necessarily incur in his defence; for we must assume that the result of the action would have been in his favor, and the law would enable him to recover costs, which it regards as a compensation for all the costs the defen-

(f) *Wade v. Simeon*, 2 C. B. 548, E. C. L. R. vol. 52.

dant sustains. Neither can the foregoing of the action be regarded as detrimental to the plaintiff, for we can only view it as saving him from the payment of those costs. The consideration, therefore, fails upon both grounds."

[Although a man has not a clear legal or equitable right, yet if his right or claim is doubtful, and not clearly nugatory or illegal, the abandonment, or, for the same reason, the forbearance of an action brought to enforce it, is a sufficient consideration for a promise.^(g) And *à fortiori*, where *the right is [*104] not doubtful, but the amount of the claim only is disputed, an agreement for the settlement of all disputes upon the payment of a definite but smaller sum than that claimed, is held to be founded upon sufficient consideration.^(h)]¹

(g) Longridge v. Dorville, 5 B. & A. 117, E. C. L. R. vol. 27; Stracey v. Bank of England, 6 Bing. 754, E. C. L. R. vol. 19.

(h) Edwards v. Baugh, 11 M. & W. 641; *Wilkinson v. Byers, 1 A. & E. 113, E. C. L. R. vol. 28; Llewellyn v. Llewellyn, 3 D. & L. 318.

¹ "A compromise of a doubtful title, when procured without such deceit as would vitiate any other contract, concludes the parties, though ignorant of the extent of their rights." Gibson, C. J., in Hoge v. Hoge, 1 Watts, 216; Brown v. Sloan, 6 Watts, 421; Meanor v. M'Kowan, 4 Watts & Serg. 304; Rinehart v. Olwine, 5 Ibid. 163; M'Culloch v. Cowper, Ibid. 427; Chamberlain v. M'Clurg, 8 Ibid. 37; Logan v. Matthews, 6 Barr, 417. Even when there was a mutual mistake of the law, the parties having acted in good faith, a compromise has been supported. M'Coy v. Hutchinson, 8 Watts & Serg. 66. The compromise of an action of slander, in which the words laid in the declaration were not actionable, was held a good consideration. O'Keson v. Barclay, 2 Penna. Rep. 531. That the claim was evidently without color would be a circumstance to show fraud or imposition upon a weak understanding, but if a man with his faculties about him, makes a promise to get rid of an annoying claim, which, though worthless, it will cost him time, trouble, and money to contest, it would be drawing the Court into too nice a discussion to determine what degree of doubt there must be about it to give validity to the compromise.

Again, it has been decided, that, if I *intrust* a man to do some act for me, although I am to pay him nothing for performing it, still the mere *trust* which I repose in him is a consideration for a promise on his part to conduct himself faithfully in the performance of it. (i) Nay, so far do the cases on this subject go, that it is settled that not only is the reposal of such trust a sufficient consideration for an express promise on the part of the person in whom it is reposed to conduct himself faithfully in the performance of it; but the law, even in the absence of an express promise, implies one that he will not be guilty of gross negligence. This was the point decided in the famous case of *Coggs v. Bernard*. (j)

[In this case Bernard had undertaken safely and securely to take up several hogsheads of brandy from one cellar, and safely and securely to lay them *down [*105] again in another; and he was held bound by that undertaking, and responsible for damage sustained by them in the removal. The reason is, said Mr. Justice Gould, the particular trust reposed in the defendant, to which he has concurred by his assumption, and in executing which he has miscarried by his neglect. If goods are deposited with a friend, and are stolen from him, no action will lie. But there will be a difference in that case upon the evidence how the matter appears. If they are stolen by reason of a gross neglect in the bailee, the trust will not save him from an action; otherwise, if there be no gross neglect. But, if a man takes upon him expressly to do such a fact safely and

(i) See *Whitehead v. Greetham*, 2 Bing. 464, E. C. L. R. vol. 9; *Shillibeer v. Glynn*, 2 M. & W. 143; * *Bainbridge v. Firmston*, ante, p. 94.

(j) 2 Ld. Raym. 909. See *Gladwell v. Steggall*, 5 Bing. N. C. 733, E. C. L. R. vol. 35.

securely, if the thing comes to any damage by his mis-carriage, an action will lie against him.]

And on this point of the law it is that the celebrated distinction occurs between remunerated and unremunerated agents; from the former of whom the law implies a promise that they will act with reasonable diligence; from the latter, only that they will not be guilty of gross negligence. [Thus, where a stage coachman received a parcel to carry gratis, and it was lost upon the road, Lord Tenterden directed the jury to consider whether there was great negligence on the coachman's part.^(k) And where the declaration stated, [*106] that, in consideration that the plaintiff, at the *defendant's request, would employ him to lay out 1400*l.* on the purchase of an annuity, the defendant promised to perform his duty in the premises, yet did not do so, but laid it out in the purchase of an annuity on the personal security of insolvent persons, the Court arrested the judgment, on the ground that the defendant was a particular agent, and was not charged with having acted negligently or dishonestly.^(l)] There is another equally remarkable distinction, namely, that a remunerated agent may be compelled to enter upon the performance of his trust, or at least made liable in damages if he neglect to do so; whereas an unremunerated agent cannot, although, as we have seen, he *may* be liable for misconduct in the performance of it. [The latter part of this proposition is fully explained in the great case of *Coggs v. Bernard* above quoted. The difference is, said Mr. Justice Powell, between being obliged to do the thing and answering for things which he had taken into his custody upon

(k) *Beauchamp v. Powley*, 1 M. & Rob. 38.

(l) *Dartnall v. Howard*, 4 B. & C. 345, E. C. L. R. vol. 10; *Doorman v. Jenkins*, 2 A. & E. 256, E. C. L. R. vol. 29.

such an undertaking. An action will not lie for not doing the thing *for want of a sufficient consideration*, but yet, if the bailee will take the goods into his custody, he shall be answerable for them, for the taking the goods into his custody is his own act. It is also remarkably illustrated in the well-known case of *Elsee v. Gatward*,^(m) where one count of the declaration, *stating that the plaintiff retained the defendant, a carpenter, to repair a house before a given day, that the defendant accepted the retainer but did not perform the work within the time, whereby the walls of the plaintiff's house were damaged, was held to be insufficient, as not showing any consideration; but another count, stating that the plaintiff, being possessed of some old materials, retained the defendant to perform the carpenter's work on certain buildings of the plaintiff, and to use those old materials, but that the defendant instead of using them, made use of new ones, thereby increasing the expense, was held good, as it appeared that the defendant had entered on the performance of the work.] [*107]

Again, if one man is compelled to do that which another man ought to have done and was compellable to do, that is a sufficient consideration to support a promise by the former to indemnify him. Such is the common case of a surety, who has been compelled to pay a demand made against the principal, and who, as we know, is entitled to bring an action of *assumpsit* to recover an indemnity. [And such is also the case of an indorser of a bill, who, on account of the acceptor's default in not paying the bill when due, is compelled by the holder to pay him the amount. The indorser may sue the acceptor to recover an indemnity.⁽ⁿ⁾ In

(m) 5 T. R. 143.

(n) *Pownall v. Ferrand*, 6 B. & C. 439, E. C. L. R. vol. 13.

like manner, if one of several joint contractors, not being *partners (whose rights *inter se* are not [*108] at common law ever decided), has been compelled to pay, or in pursuance of his legal obligation has paid, the whole of their common liability, he is entitled to recover from each of them his proportional share.(o) An instructive example of the same rule is afforded by the case of Sutton v. Tatham,(p) in which a stockbroker having entered into a contract for the sale of stock, which was not fulfilled by his principal, and similar stock having been thereupon purchased at a higher price by the broker of the purchaser, the seller's broker, in obedience to a rule of the Stock Exchange, paid the difference, and also the commission of the purchaser's broker, it was held that he might recover from his principal the amount of such payments, by showing that it was compulsory upon him to make them. These examples seem sufficient to explain the nature of the species of consideration now before us.(q)]

I might cite a multitude of other cases in which questions have arisen as to the sufficiency of the consideration; but I think that the instances I have already given are sufficient for the purpose I had in view, which was to illustrate the general nature of the questions which arise on the sufficiency of a *consideration* to support a promise.

[*109] *There is, however, one thing more to be observed, and that is the distinction between *exe-*

(o) Holmes v. Williamson, 6 M. & S. 158; Prior v. Hembrow, 8 M. & W. 873; *Pitt v. Purssord, 8 M. & W. 538; *Batard v. Hawes, 22 L. J. (Q. B.) 443.

(p) 10 A. & E. 27, E. C. L. R. vol. 37; Pawle v. Gunn, 4 Bing. N. C. 445, E. C. L. R. vol. 33.

(q) Toussaint v. Martinant, 2 T. R. 100; Fisher v. Fallows, 5 Esp. 171; Jeffreys v. Gurr, 2 B. & Ad. 833, E. C. L. R. vol. 22.

cuted and *executory* considerations. Now, with regard to the meaning of these words, which you will continually hear used in legal arguments, it is this:—an *executed consideration* is one which has *already taken place*, an *executory consideration* one which *is to take place*; one is *past*, the other *future*. Thus if *A.* deliver goods to *B.* yesterday, and *B.* makes a promise to-day in consideration of that delivery, this promise is said to be founded upon an *executed* consideration, because the delivery of the goods is past and over. But, if it be agreed that *A.* *shall* deliver goods to *B.* to-morrow, and that *B.* shall, in consideration, do something for *A.*, here is an *executory consideration*, because the delivery of the goods has not yet taken place. And so whenever, at the time of making a promise, the consideration on which it is founded is *past*, the consideration is said to be *executed*; whenever the consideration is future, it is said to be *executory*.¹

¹ There are also said to be two other kinds of consideration, viz., concurring and continuing. The former arises in the case of mutual promises; as where *A.* and *B.* being competitors for the bounty for the best manufactured cloth, agreed that the successful competitor should divide the bounty with the other, the promises were mutual, and in consideration of each other. *Briggs v. Tilloton*, 8 Johns. 306. So where several promise to contribute to a common object: *Stewart v. Trustees of Hamilton College*, 2 Denio, 403; *Society of Troy v. Perry*, 6 New Hamp. 164; where one promises to become a partner, and the other promises to receive him as such: *M'Neil v. Reid*, 9 Bingham, 68, 23 E. C. L. R. and the like; *Wood v. Rice*, 4 Metcalf, 481; *Wightman v. Coates*, 15 Mass. 1; *Willard v. Stone*, 7 Cowen, 22. In cases of concurrent considerations, if the promise of either party should fail to bind him (as from illegality of subject-matter, or any such cause), the other promise would be deprived of its support, and the contract could not be enforced. It is also necessary that the promises should be mutual and simultaneous: *Thornton v. Jenyns*, 1 Scott, 74; and an averment, that in consideration of the plaintiff's

Now between *executed* and *executory*, or, in other words, between ^e*past* and *future* considerations, the law makes this distinction, namely, that an *executed* consideration must be founded on a previous request; an *executory* one need not, or, to speak more correctly, its very terms imply a request. [For, if *A.* promise to remunerate *B.*, in consideration that *B.* will perform [*110 something *specified, that amounts to a request to *B.* to perform the act for which he is to be remunerated.(*r*)] For instance,(*s*) Bate's servant was arrested and sent to prison, and Hunt became bail for him, and procured his liberation, after which the master promised Hunt to save him harmless. Hunt was obliged to pay the servant's debt, and brought an action against Bate upon his promise to indemnify him; but the Court held that it would not lie. "For," said the Judges, "the master did never make *request* to the plaintiff to do so much, but he did it of his own head." But, the report goes on to say, "in another action brought

(*r*) 1 Smith L. C. 70, note. (*s*) Hunt v. Bate, Dyer, 272.

promise, the defendant "*afterwards, to wit, on the same day, promised,*" has been held bad, the promise having no consideration; that is, no consideration but another promise, and that promise was not a mutual and simultaneous one. *Livingston v. Rogers*, 1 Caines, 583; *Fricke v. Wood*, 12 Johns. 190; *Keep v. Goodrich*, Id. 397.

It has been sometimes said, that a *continuing* consideration is sufficient to support a promise, as where one should promise in consideration of what the other party had done and might thereafter do. But, in reality, it is the *executory* part of the consideration which is alone valuable, and is sufficient to support the whole promise; and such, upon examination, will, it is believed, be found to be the true ground of decision of the cases. *Pearle v. Unge*, Cro. Eliz. 94; *Brett v. J. S.*, Cro. Eliz. 735; *Colton v. Westcott*, 1 Rolle, 381; *Loomis v. Newhall*, 15 Pick. 159; *Andrews v. Ives*, 3 Connecticut, 368.—R.

on a promise of twenty pounds made to the plaintiff by the defendant, in consideration that the plaintiff," *at the special instance of the defendant*, had taken to wife the cousin of the defendant, that was a "good cause of action, though the marriage was *executed* and *past* before the undertaking and promise, because the marriage ensued at the *request* of the defendant."¹

¹ A very good illustration of this principle may be found in the recent case of *Dearborn v. Bowman*, 3 Metcalf, 155, where the plaintiff had in a political campaign rendered services in the circulation of pamphlets to aid the election of the defendant, who had subsequently promised to pay him therefor, and the Court, in holding the promise to be destitute of consideration, said, "such services impose no obligation, legal or moral, on the defendant, and it would be somewhat dangerous to hold that they created any honorary obligation on him to pay for them. Nor would it be aided in a legal view by a previous custom, if proved, for candidates to contribute to the payment of similar expenses, whether successful or otherwise in the election. Nor were these services performed at the request of the defendant. On the contrary, it appeared by the evidence, that they were performed by the chairman of the county committee, who alone was responsible for the payment, and between whom and the defendant there was no privity, nor even any communication until long after the services had been performed. The rule of law seems to be now well settled, though it may have been formerly left in doubt, that the past performance of services constitutes no consideration even for an express promise, unless they were performed at the express or implied request of the defendant, or unless they were done in performance of some duty or obligation resting on the defendant. *Mills v. Wyman*, 3 Pick. 207; *Loomis v. Newhall*, 15 Pick. 159; *Dodge v. Adams*, 19 Pick. 429. As the services performed by the plaintiff were not done at the request of the defendant, as they were not done in the fulfilment of any duty or obligation resting on him, there was no consideration to convert the express promise of the defendant into a legal obligation." To the same point are *Snevely v. Reed*, 9 Watts, 396; *Geer v. Archer*, 2 Barbour, 420; *Hudson v. Overtuff*, 1 Scammon, 170; *Kinnerly v. Martin*, 8 Missouri, 698; *Beaumont v. Reeve*, 8 Queen's Bench, 483, 55 E. C. L. R.—R.

These two cases clearly illustrate the distinction between an *executed* consideration *moved* by a previous request, which will support a promise, and an executed consideration not moved by a previous request, which will not support a promise. You will find the same distinction clearly explained in *Lampleigh v. Brathwaite*; (t) [*111] [where the Court said, **"a mere voluntary courtesy will not have a consideration to uphold an assumpsit. But if that courtesy were moved by a suit or request of the party who gives the assumpsit, it will bind; for the promise, though it follows, yet it is not naked, but couples itself with the suit before, and the merits of the party procured by that suit, which is the difference."*]¹

But here arises another distinction, and it is the last to which I shall refer upon this subject; but this is a distinction to which it is absolutely necessary to refer, in order that you may not be misled by what I have already stated. There being the rule I have just stated regarding *executed considerations*, namely, that an *executed consideration* must have arisen from a previous request by the person promising, in order that it may be sufficient to support the *promise*, there are certain classes of cases in which this *previous request* is *implied*, and need not be expressly proved by the person to whom the promise is given. Now the cases in which a previous request is implied are as follows—

First, the case which I have already stated, *in which*

(t) Hob. 105. See Judgment in *Eastwood v. Kenyon*, 11 A. & E. 438, E. C. L. R. vol. 39.

¹ The student who seeks for a more extended analysis of this subject than can be afforded in these elementary lectures, may most profitably refer to the note to *Lampleigh v. Brathwaite*, 1 Smith's Lead. Cases, 195, 4th Amer. Ed., and that to *Vadakin v. Soper*, 1 Amer. Lead. Cases, 120.—R.

one man is compelled to do that which another ought to have done and was compellable to do. In this case, the consideration is an *executed* one, for the thing must have been *done* before any promise can be made to reimburse the person who has done it; but, though the consideration is *executed*, *the law implies the request.* And therefore in this case an action may be brought for indemnity without *proving any express request on the part of the defendant.^(u) [In [*112] addition to the examples already given, the case of *Exall v. Partridge*(*x*) is well calculated to set this matter in a clear light. There the defendant was tenant of certain premises, and under covenant to pay rent to the landlord for them. Having neglected to pay the rent, the goods of a stranger to the contract between the landlord and tenant, which were upon the premises of the latter, were distrained by the landlord for the rent arrear, and it was held that he might sue the tenant for the money which he had paid, in order to redeem his goods; although it is obvious, from the state of the facts, that no request that he should do so had in fact been made by the tenant. In *Grissell v. Robinson*,(*y*) the plaintiffs had contracted to grant the defendant a lease; the lease was prepared by their solicitor and executed. It is the general practice for the lessor's solicitor to prepare the lease, and for the lessee to pay the solicitor; the lessee having refused so to do, the lessors paid him, as they might have been compelled to do; and the Court decided that an action was maintainable by them for money paid at the lessee's request.^(z)]

(u) See Judgment of Queen's Bench in *Batard v. Hawes*, 22 L. J. (Q. B.) 443.

(x) 8 T. R. 308.

(y) 3 Bing. N. C. 10, E. C. L. R. vol. 32.

(z) *Jeffreys v. Gurr*, 2 B. & Ad. 833, E. C. L. R. vol. 22; *Pownal v. Ferrand*, 6 B. & C. 439, E. C. L. R. vol. 13.

I must further observe upon this class of cases, and also upon the next, that, not only is the request [*113] *implied, but the *promise* also; for if, to put an example, *A.* is indebted to *B.* in a certain sum of money, and *C.* is his surety; if *C.* be compelled to pay, not only is a request by *A.* to do so implied by law, but a promise by him to indemnify *C.* is also implied. And, in an action brought by *C.* to enforce the indemnity, he need prove no express promise, no express request, but simply that *A.* was indebted to *B.*, and that he, *C.*, as *A.*'s surety, was compelled to pay that debt. (a) [For an example of this, you may take the common case of an accommodation acceptor or indorser, who, as soon as he has been obliged to pay the money, may maintain an action against the person for whose accommodation he accepted or indorsed. (b)]¹

(a) *Pawle v. Gunn*, 4 Bing. N. C. 448, E. C. L. R. vol. 33.

(b) *Driver v. Burton*, 21 L. J. (Q. B.) 157.

¹ This principle is well illustrated by the case of *Draughan v. Bunting*, 9 Iredell, 13, where the plaintiff, who had indorsed and been compelled to pay a promissory note, relied in an action against a prior indorser, on a parol promise of indemnity given to him by the maker at the time of the indorsement. The Court held it clear that the action could not be sustained on the parol promise, because being one "to answer for the debt or default of another," it came within the Statute of Frauds, and should therefore be in writing, but that the law *implied* a promise to indemnify from the relation of suretyship, upon which the plaintiff might have recovered, but for the following circumstance: the plaintiff, in order to prove this parol promise, had called the maker of the note as a witness, and had been obliged to execute a *release* to him, in order to restore his competency, and it was urged that this release to the principal discharged the surety, which was undoubtedly correct, as the court held; but it being also in evidence that the defendant had acknowledged the receipt of funds from the maker, wherewith to discharge the debt, it was held that a promise was implied thus to apply the money, and the plaintiff was held entitled to recover upon his count for money paid.—R.

Secondly, where the person who is sought to be charged *adopts* and *takes advantage* of the *benefit* of the consideration. Suppose, for instance, *A.* purchases goods for *B.* without his sanction, *B.* may, if he think fit, repudiate the whole transaction; but if, instead of doing so, he receive the goods and take possession of them, the law will imply a request from him to *A.* to purchase them, and will also imply a promise by him to repay *A.*, and he will be liable in an action of *assumpsit* for money paid to his use, founded on that implied promise. [The cases where goods have been *supplied to children without the knowledge or [*114] express request of the father, are illustrations of this rule. Even where the goods supplied are necessities, some recognition amounting to adoption is requisite, in order to render the father liable, and to support the implied request and promise; in such case it is sufficient that the father should have seen them worn by the child without objection.(c)] See 1 Wms. Saund. 264, note 1, where you may, if you please, find a great deal of valuable information upon the whole subject of which I am now treating.¹

The *third* case, in which a request is implied, is that in which a person does, without compulsion, that which the person sought to be charged was compellable by law to do. Suppose, for instance, *A.* owe *B.* 50*l.*, and *C.* pays it: now here, if *A.* promise to repay *C.*, it will be implied that the payment by *C.* was

(c) *Law v. Wilkin*, 6 A. & E. 718, E. C. L. R. vol. 33. See *Mortimore v. Wright*, 6 M. & W. 482.

¹ Instances of the application of this rule will be found in *Pawle v. Gunn*, 4 Bingh. N. C. 448, 33 E. C. L. R.; *Derby v. Wilson*, 14 Johns. 378; *Rowntree v. Holloway*, 13 Alab. 357; *Kenan v. Holloway*, 16 Id. 58; *Guerard v. Jenkins*, 1 Strobhart, 171.—R.

made at his request.(d) But, in this class of cases, you will observe, though the request is implied where there is a promise, yet the promise must be *express*, for the law will not imply one, as in the two last cases:(e) thus, if *A.* is *B.*'s surety, and is forced to pay his debt, the law implies a request to pay it, and a promise to [*115] repay. If he be not *B.*'s surety, but pays it of *his own accord, the law implies neither promise nor request, for a man cannot make me his debtor by paying money for me against my will.¹ Yet, even in this case, if *B.* expressly promise to repay it, a request by him to pay it is implied, for it is a maxim that *omnis ratihabitio retrotrahitur et mandato æquiparatur.*²

In the three cases I have just put the law *implies* a request, on the part of the person sought to be charged, to do that which is relied on as the consideration for the promise upon which it is sought to charge him.³

(d) *Wing v. Mill*, 1 B. & Ald. 104.

(e) *Atkins v. Banwell*, 2 East, 505.

¹ *Durnford v. Messiter*, 5 Maule & Selw. 445; *Weakly v. Brahan*, 2 Stewart, 500; *Keenan v. Holloway*, supra; *Lewis v. Lewis*, 3 Strobbart, 532; *Mathews v. Colborne*, 1 Id. 258; *Young v. Dibbrell*, 7 Humph. 270.—R.

² *Winsor v. Savage*, 9 Metcalf, 348; *Lewis v. Lewis*, 3 Strobbart, 530; 1 Saunders, 264, n.—R.

A voluntary payment of money by one person for the use of another without a previous request, will not support a subsequent promise to refund, unless the payment is beneficial to the promisor. *Kenan v. Holloway*, 16 Alabama, 53; see *Turner v. Partridge*, 3 Penna. Rep. 172.

³ The salutary legal principle which lies at the bottom of all the cases upon this subject, is, that every legal liability must spring from something *actually done*, and not from something *merely said*. From this, it is easy to perceive how it is, that from certain acts the law will imply a promise, which shall be so highly regarded that an express promise shall not be allowed to vary it (*Hopkins v. Logan*, etc., supra), and while at the same time it will disregard the most solemn verbal

[These implied requests, and also the implied promises just mentioned, are presumptions of law, of the

undertaking that does not spring from some actual transaction. Hence it is, that a warranty *after* a sale cannot be enforced, unless something new be done at the time of giving the warranty, for the promise stands upon words and not upon acts. *Roscorla v. Thomas*, *supra* : *Hogins v. Plympton*, 11 Pick. 97 ; *Williams v. Hathaway*, 19 Pick. 387 ; *Bloss v. Kittridge*, 5 Verm. 28. In like manner, an undertaking by a landlord for his tenant's quiet enjoyment, is, when made after the contract of tenancy has been entered into, wholly ineffectual for any purpose. *Granger v. Collins*, 6 Mees. & Wels. 458. So, after a bargain has been made, a naked promise to pay more or to take less than the contract price, is useless to the party receiving it. *Geer v. Archer*, 2 Barbour, S. C. R. 420 ; *Williams v. Hathaway*, 19 Pick. 387. And the reason of these cases is obvious, from the danger which would arise if mere conversations, unsupported by acts, were allowed to go to a jury, as evidence from which they might mould them into contracts. Hence, too, arises an important class of cases, which determine that a precedent debt cannot, of itself, form a sufficient consideration for a promise, for such a debt arises from a contract already fulfilled, and therefore comes within the legal principle just stated : *Hopkins v. Logan*, 5 Mees. & Wels. 241 ; *Vadakin v. Soper*, 1 Aiken, 287 ; *Russell v. Buck*, 11 Verm. 176 ; *Barker v. Bucklin*, 2 Denio, 59 ; *Railroad Co. v. Johnson*, 7 Watts & Serg. 317-328 ; *Jackson v. Jackson*, 7 Alab. 791 ; although, when such a promise is cotemporaneous with an *actual transaction*, such as a suspension, or an extinguishment of the precedent debt, the acquisition of an additional security for its payment, the commencement of a new course of dealing, or the like, it will be enforced by law, for it does not rest on mere words : *Peate v. Dicken*, 1 Cr. Mees. & Rosc. 423 ; *Wilson v. Coup-land*, 5 Barn. & Ald. 228 ; *Clark v. Sigourney*, 17 Connect. 511 ; *Phillips v. Bergen*, 2 Barb. 608 ; *Smith v. Weed*, 20 Wend. 184 ; *Meld v. Nichols*, 17 Pick. 538 ; *Taylor v. Meek*, 4 Blackford, 388.

The sound reasons for what would at first appear to be a pertinacious adherence to a narrow rule, are thus expressed by Mr. Hare, after a review of the authorities, in the note to *Vadakin v. Soper*, 2 Amer. Lead. Cases. "The general principle," says he, "which requires that every express contract shall be sustained by a cotemporaneous consideration, is, in effect, a rule of evidence of great importance, to the exclusion of fraud and misrepresentation from the tribunals of justice. If a mere verbal promise, without consideration, were sufficient to

class known as *presumptiones juris et de jure*, which are absolute and conclusive. Any law or rule of law

create a legal liability and sustain an action, no safety could be found against the misrepresentation of the most ordinary conversation, unless in the sagacity of the jury called to determine (perchance on a prejudiced or false relation), whether it was meant or understood as a positive obligation for the payment of money, or the fulfilment of an engagement of any other description. And if a past consideration were sufficient to give such an engagement validity, the danger would be as great, for men, though but little disposed to promise further compensation for past services in their own case, are sufficiently ready to believe such an allegation in that of another, especially if supported by any plausible pretence, that the amount originally bargained for was insufficient. The chance of an erroneous verdict would be still greater in those instances, in which a bargain has resulted disadvantageously for one of the parties, and where he has induced the other to hold any language which can be construed or perverted into a promise of indemnification. The necessity for proving the existence of a contemporaneous consideration, obviates this danger, by bringing the evidence back from words to things, which are not so easily susceptible of mistake or falsification. The uncertainty which results from looking to the subsequent language of a party, as the test of his liability, has been found so great in the cases arising under the Statute of Limitations, as to lead to the introduction, in England, and some parts of this country, of legislative enactments, making it necessary that the acknowledgment of the debt should be in writing, and not be proved by mere verbal testimony. Yet in that case, the only effect of the evidence is to revive an anterior liability, of which the original existence is proved *aliunde*, and it is therefore easy to imagine what would be the result if every transaction of human life were open to the interpretation which a witness or jury might choose to give to any subsequent conversation of which it is made the subject. It would, therefore, appear, that the rules of the common law with respect to considerations, so far from deserving the reproach of narrowness and illiberality which has been sometimes cast upon them, are really founded upon a just appreciation of the uncertainty of testimony, and the exigencies of life, and should be sedulously upheld and applied, and not explained away or disregarded. It may safely be asserted that they do more to prevent fraud and perjury than any legislative enactment which has been, or can be devised for that purpose, and that if they had not been laid down and defined by judicial sagacity, it would be necessary to introduce them by legislative authority."

onsists in nothing more than the connecting of certain consequences with particular defined predicaments of fact. When, therefore, the law presumes or infers any fact to which a legal consequence is annexed from any defined predicament of facts, it in effect indirectly annexes to that predicament the legal consequence which belongs to the fact presumed. Consequently, the nature and effect of the presumption or implication here made is to annex a legal consequence to the fact on which the presumption is founded, declaring that wherever

It is necessary to distinguish the class of cases referred to, from those which decide that a promise to pay a debt barred by the statutes of bankruptcy or limitation is based upon sufficient consideration. Some expressions in the cases would seem to conflict with the general principle just referred to, but in reality the grounds of decision are in harmony. The promise of a debtor to pay a debt so barred, although it is often called a new promise, is in reality rather a *waiver* of the bar which the statute has interposed. In pleading, it is sufficient to count on the original debt, and when the statute is pleaded, the evidence offered under the replication of a new promise or acknowledgment within six years, forms no variance between the declaration and the proof, for whether the defendant is liable by reason of the original consideration for the debt, or by reason of his subsequent acknowledgment, is immaterial, provided the plaintiff prove the original consideration, and the liability at the time of suit brought, and if that liability arise from the new promise, it is just such a liability as the law implies from the old consideration, and hence the new promise accords with the old one, and there is no variance. This will be found fully explained in the note to *Whitecomb v. Whiting*, 1 Smith's Leading Cases, 621, 4th Am. ed. But in the ordinary case of a precedent debt, a declaration setting forth that the plaintiff had contracted to build a wagon for \$100, and that having done so, the defendant, in consideration thereof, promised to pay him \$200, would be clearly bad, for such a promise would not be implied by law from the old consideration, which was the only one. So, in the case of an indebtedness to two persons jointly, a promise by the debtor, in consideration of the promise, to pay one-half the debt to one of them, could not be enforced, for it is not such a promise as the law implies from the old consideration, and this was the case of *Vadakin v. Soper*, *supra*.—R.

the considerations to which they apply exist, the same consequence shall ensue as if they were moved by the [*116] request of the *promisor and followed by his promise; and their object mainly is, by thus supplying the request or promise or both of them, to gain the advantage of arranging these cases in the same class with many others which much resemble them, but in which the request and the promise were actually made. In the cases where these presumptions are made, it will be observed that the facts presumed are altogether immaterial; but the consequence is, that justice is effectually done.]

There is a fourth class of cases, in which the consideration relied on has been that one man has done for another something which that other, though not *legally*, is morally bound to do. In such cases it is clear, that, if there be no *express* promise to remunerate him, remuneration cannot be enforced. But it has been made a great question, and has been frequently discussed, whether, even if there be an express promise, any request can be implied in order to support the consideration. On this question, which is but a branch of one which has been often the subject of anxious consideration, namely, in what cases a moral obligation is a sufficient consideration to support a promise, it is worth while to read the cases cited in the note.(f) [But it may be considered as now settled, [*117] that a merely moral consideration *will not support a promise.(g) A mere moral consideration has been said by high authority to be no-

(f) *Lee v. Muggeridge*, 5 Taunt. 36, E. C. L. R. vol. 1; *Atkins v. Banwell*, 2 East, 505; and the note to *Wennall v. Adney*, 3 B. & P. 247.

(g) *Monkman v. Sheperdson*, 11 A. & E. 415, E. C. L. R. vol. 39; *Beaumont v. Reeve*, 8 Q. B. 483, E. C. L. R. vol. 55.

thing in law.(h)] "A subsequent express promise," said Tindal, C. J., "will not convert into a debt that which of itself was not a legal debt."(*i*) And it was laid down by the Court of Queen's Bench, in an elaborate judgment in the case of *Eastwood v. Kenyon*,(*j*) that "An express promise can only revive a precedent good consideration, which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law, but can give no original cause of action, if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision."(*k*)¹

(*h*) *Jennings v. Brown*, 9 M. & W. 501.

(*i*) *Kaye v. Dutton*, 7 M. & Gr. 807, E. C. L. R. vol. 49.

(*j*) 11 A. & E. 438, E. C. L. R. vol. 39.

(*k*) See remarks of Lord Denman, C. J., ante, p. 87.

¹ In some of the earlier American cases, there were many dicta and a few decisions in favor of a moral consideration being sufficient to support a promise: *Greeves v. M'Allister*, 2 Binney, 591; *Willing v. Peters*, 12 Serg. & Rawle, 177; *Doty v. Wilson*, 14 Johnson, 378; but these cases, like the English decisions in *Lee v. Muggeridge*, and *Wing v. Mill*, 1 Barn. & Ald. 104, were subsequently expressly overruled by *Snevily v. Reed*, 9 Watts, 396; *Kennedy v. Ware*, 1 Barr, 445; *Mills v. Wyman*, 3 Pick. 207; *Beaumont v. Reeve*, 8 Queen's Bench, 483, 55 E. C. L. R.; *Cook v. Bradley*, 7 Connect. 57; *Loomis v. Newhall*, 15 Pick. 159; *Dodge v. Adams*, 19 Id. 429; *Kinnerly v. Morton*, 8 Missouri, 698; *Kenan v. Holloway*, 16 Alab. 58; and such a doctrine may, perhaps, be now fairly considered as having no established place in the jurisprudence of either country.—R.

See *Ellicott v. Peterson*, 4 Maryland, 476; *Womack v. Womack*, 8 Texas, 397; *Turner v. Chrisman*, 20 Ohio, 332; *M'Farland v. Mathis*, 5 English, 560; *Nash v. Russell*, 5 Barbour Sup. Ct. Rep. 556; *Watkins v. Halstead*, 2 Sandford Sup. Ct. Rep. 311; *Geer v. Archer*, 2 Barb. Sup. Ct. Rep. 420; *M'Kinley v. O'Keson*, 5 Penna. Stat. Rep. 369.

There would appear, however, to be authority for an important exception to the general principle that a moral obligation is not a

I have now said what I intended to say with regard to the sufficiency of the consideration, and the result may be thus summed up :—

Any advantage to the person promising, or damage, inconvenience, liability, or charge to the person to whom the promise is made, constitutes a sufficient con-

sufficient consideration. Wherever an actual benefit has been enjoyed from the unsolicited services of another, it is a sufficient foundation for an express promise, although no promise will be implied. Thus, an uncompleted contract on a railroad was assigned by the contractor for the benefit of creditors. There was, in the hands of the Railroad Co., a fund consisting of retained percentage; the assignor's right to which depended upon the completion of the contract. The assignor made a contract with the plaintiff that he should complete the contract at his own expense, and receive a certain compensation. The creditors, for whose benefit the assignment had been made, drew an order on the assignee in favor of plaintiff, for the amount expended by him on the work, and for a certain sum for his trouble. It was held, that the work having been completed by the plaintiff, the order became irrevocable, whether drawn before or after performance of the work. And one of the creditors receiving a dividend out of the fund from the assignee, is liable to the plaintiff in an action for money had and received. *Cunningham v. Garvin*, 10 Penna. Stat. Rep. 366. Bell, J. : "If it be admitted that the order was made after the completion of the work, we have a case of a past consideration flowing from a benefit conferred. Now though anciently this was thought inadequate to support a present promise to pay, it has long been settled that a benefit derived from the unsolicited services of another, creates a moral obligation of sufficient potency to sustain an express promise." On the other hand, where a grandfather devised to his grandson a tract of land, which, by his will, he directed should be patented, and the price thereof paid out of his estate; an uncle of the devisee's obtained the patent and paid for it, and brought an action against the executors of the grandfather's estate, to recover it back: it was decided that it was a voluntary payment by him which gave no right of action. *Turner v. Patridge*, 3 Penna. Rep. 172. Gibson, C. J. : "In procuring the patent without compulsion of the law or request of the party interested, the plaintiff laid the defendants under a moral obligation, which, though sufficient as a consideration for an express promise, raised no promise by implication of law."

sideration to uphold a promise ; but, if that consideration be executed, that is, if, *at the time of making the promise, that which is to be the consideration for it has already taken place, in such case there must have been a *request* by the person promising, in order to render such a consideration sufficient. If an *express request* can be shown, there can be no difficulty ; but, if not, the law will imply one in certain cases, and those cases are—

1st. Where the consideration consists in the person to whom the promise is made being compelled to do that which the person making it ought to have done, and was compellable to do.

2dly. Where the consideration consists in something the benefit of which the person promising has accepted and enjoyed.

3dly. Where the consideration consists in the person to whom the promise is made having *voluntarily* done that which the person promising ought to have done, and was compellable to do (and in this third case the promise must be an *express* one, whereas in the two former the law implies *it* as well as the request).

[The remaining part of a contract is the promise, as to which the law in general leaves to the will of the parties this part of their mutual arrangement. Indeed, this has almost been said already in other words ; for, where it is laid down that the law will not weigh the adequacy of the *consideration,(l) it is implied that it will not weigh that of the promise. The law, however, will no more enforce an illegal promise than an illegal consideration ; and in cases of executed contracts there is a rule of law which is well worthy

(l) Ante, p. 92.

of attention. It is, that where the law implies a certain promise from a consideration executed—that consideration will not support any other promise than the one which the law implies.(*m*) It is not difficult to see that this rule results from the principle which requires that every promise should be supported by a consideration; for, when the consideration in question is one from which the law implies a certain promise, that promise evidently exhausts the consideration, and there is nothing left to support any other promise. Such promise, however expressly made, is consequently *nudum pactum*. Thus, it has been decided,(*n*) that an account stated and a sum thereupon found to be due to the plaintiff, from which the law implies a promise to pay *in præsentî*, will not support a promise to pay *in futuro*; and each of the Judges(*o*) said, that, in order to render the promisor liable to pay on a future day, there ought to be some new consideration.

[*120] Similar in *principle to the instance just mentioned is the case, where one, having become tenant to another of a farm, undertook to make a certain quantity of fallow, to spend 60*l.* worth of manure yearly thereon, and to keep the buildings in repair; an undertaking which was considered unavailable in law, because no other consideration existed but the fact that the relation of landlord and tenant had been created between the parties, and the obligations sought to be enforced are not implied by law from that mere fact.(*p*) The promise, as the Court of Exchequer said in a subsequent and closely analogous case,(*q*) is laid

(*m*) *Elderton v. Emmens*, 5 C. B. 160, in Exchequer Chamber.

(*n*) *Hopkins v. Logan*, 5 M. & W. 249, Smith L. C., 3d ed. 70, c.

(*o*) Lord Abinger, C. B., and Parke, Alderson, and Maule, Barons.

(*p*) *Brown v. Crump*, 1 Marsh. 567, E. C. L. R. vol. 4.

(*q*) *Granger v. Collins*, 6 M. & W. 458; *Jackson v. Cobbin*, 8 M. & W. 790.

more largely than the law will imply from such a relation.

Another instance of the same principle, drawn from a different class of cases, is afforded by the case of *Roscorla v. Thomas*,^(r) in which the declaration having alleged that the plaintiff had bought a horse of the defendant at a certain price, the defendant promised that it did not exceed five years old, and was sound and free from vice; and the plaintiff having obtained a verdict, the Court arrested the judgment, because the only promise which could be implied from the consideration was to deliver the horse upon request; and therefore, however expressly the promise alleged might *have been made, the consideration would not [*121] support it.]

Proceeding in the order in which I stated to you that it was my intention to proceed, the next subject at which we arrive is, the effect of *illegality* upon the contract. And upon this subject I have already said generally, that every contract, be it by deed or be it without deed, is void if it stipulate for the performance of an illegal act, or if it be founded upon an illegal consideration. *Ex turpi causâ non oritur actio* is the maxim of our, as well as of the civil law.^(A) A deed,

(r) 3 Q. B. 234, E. C. L. R. vol. 43.

(A) It is immaterial whether the illegality be part of or only introductory to the cause of action; if the plaintiff requires any aid from an illegal transaction to make out his case, he cannot maintain it: *Simpson v. Bloss*, 7 Taunt. 246; [*Scott v. Duffy*, 3 Harris, Pa. 18; *Deering v. Chapman*, 22 Maine, 488.] This rule was upheld in the very recent case of *Fivaz v. Nicholls*, 15 Law Journ. 125, C. P. [2 C. B. 500, 52 E. C. L. R.], where the plaintiff brought an action on the case against the defendant for having corruptly conspired to cheat the plaintiff, and deprive him of his costs in a previous action on a bill of exchange, in which the plaintiff obtained judgment on the ground that it was given for an illegal consideration; but it having appeared that

for the purpose of charging the maker, requires, as we have seen, no consideration at all to support it; but an illegal consideration is worse than none, and if it be founded upon such a one, it will be void, nor will the rules relating to estoppel prevent the party from setting that defence up. A simple contract *requires*, as we have seen, a consideration to support it. If the consideration be illegal, it is *a fortiori* void; nor will rules which I endeavored to explain regarding the inadmissibility of parol evidence to contradict a writing prevent that defence from being set up where the illegality does not appear on the face of the instrument, any more than the doctrine of estoppel will avail to prevent inquiry into the true consideration for a deed. Parties cannot deceive the law by the form of their contracts: and, as an illegality in the consideration is fatal, so, and upon the very *same grounds*, is one in the [**122*] *promise*. “*You shall not*,” *says the L. C. J. in *Collins v. Blantern*,^(s) “stipulate for iniquity.”

(s) 2 Wils. 341. See ante, p. 13, where this subject is partially treated of.

the bill had been originally indorsed by the plaintiff to the defendant to compromise a felony, this illegality being the foundation of the subsequent action, was held to invalidate it. [And to the same effect are *Bridge v. Hubbard*, 15 Mass. 96; *Tuthill v. Davis*, 20 Johns. 287; *Edwards v. Skirving*, 1 Brevard, 548; *Coulter v. Robertson*, 14 Smedes & Marsh. (Miss.) 29, where the illegality of the original consideration was held to taint all the subsequent securities flowing from it.—R.]

It is well settled that in reference to all acts or contracts, which are unlawful on account of their immorality or their tendency to promote it, or because they are hostile to public policy, the parties thereto are *in pari delicto*. So, money paid or land conveyed on an immoral contract, cannot be recovered back. *White v. Hunter*, 3 Foster, 128. Every new agreement entered into for the purpose of carrying into effect any of the unexecuted provisions of a previous illegal contract is void. *Gray v. Hook*, 4 Comstock, 449.

If the consideration be legal, a promise to do several acts, some illegal and some legal, renders the contract valid quoad the legal acts; ^(t) but if any part of the consideration be illegal the whole contract fails.

Now illegality is of two sorts: it exists at *common law*, or is created *by some statute*.

A contract illegal at common law is so on one of three grounds: either *because it violates morality*; or *because it is opposed to public policy*; or *because it is tainted with fraud*.

Of the first class, those namely which are void because they violate the principles of morality, you will find an example in the case of *Fores v. Johnes*, ^(u) in which Mr. Justice Lawrence held, that a print-seller could not recover the price of libellous publications which he had sold and delivered to the defendant. "For prints," said his Lordship, "whose objects are general satire or ridicule of prevailing fashions or manners, I think the plaintiff may recover; but I cannot permit him to do so for such whose tendency is immoral, nor for such as are libels on individuals, and for which the plaintiff might be rendered criminally answerable for a libel."¹

(t) Ante, p. 16.

(u) 4 Esp. 97.

¹ So it was held that the printer of the "Memoirs of Harriet Wilson," could not recover the price of printing them, the work being immoral and libellous. *Poplett v. Stockdale*; *Ryan & Moody*, 337, 21 E. C. L. R.

Nothing is better settled than that a promise in consideration of future illicit cohabitation is void: *Walker v. Perkins*, 3 Burrow, 1568; *Rex v. Inhabitants of Withringfield*, 1 Barn. & Adolph. 912, 20 E. C. L. R.; *Winnebrun v. Weisiger*, 3 Monroe, 35; *Travinger v. M'Burney*, 5 Cowen, 253; and it is immaterial whether such promise be or be not backed by the solemnity of a seal. *Walker v. Perkins*. But where the sealed instrument is given in consideration of *past*

[*123] * [For this reason the printer of an immoral and libellous work cannot maintain an action for the price of his labor against the publisher who employed him. "I have no hesitation," said Best, C. J., "in declaring that no person who has contributed his assistance to the publication of such a work can recover in a Court of justice any compensation for the labor so bestowed. The person who lends himself to the violation of the public morals and laws of the country, shall not have the assistance of those laws to carry into

seduction or cohabitation, it will be enforced : *Turner v. Vaughan*, 2 *Wilson*, 339 ; *Wye v. Mosely*, 6 *Barn. & Cress.* 133 ; while a *parol* promise, based upon such a consideration, is worthless. *Beaumont v. Reeve*, 8 *Queen's Bench* ; *Singleton v. Bremar*, *Harper*, 201. The distinction between these classes of cases is this : *all* contracts, whether sealed or *parol*, based upon *future* immoral connection, are void, because to enforce them would be to offer a premium for future immorality. And all *parol* contracts in consideration of *past* connection are void, on the simple ground of the consideration being executed, and the transaction not being such, as according to the rules already explained, the law would *imply* a promise to pay for. But a *specialty* given for *past* connection can be enforced, because there is a consideration, viz., that imported by the seal, and as regards the immorality, the injury having been already done, there is no principle of law that forbids its being remedied, and it has been latterly held that even if connection be continued after the giving of the bond, that will not vitiate the instrument, if such continuance did not enter into the transaction : *Hall v. Palmer*, 3 *Hare*, 532 ; and in a trial at *Nisi Prius*, Best, Ch. J., left it to the jury to determine, whether at the time of giving such bond, the continuance of the connection formed part of the transaction, for if it did, the obligee could not recover ; if it did not, there was nothing in the transaction prohibited by the law. *Friend v. Harrison*, 2 *Car. & Payne*, 584, 12 *E. C. L. R.*

There is a class of cases which determine that promises in consideration of a forbearance or compromise of a prosecution for bastardy, can be enforced : *Haven v. Hobbs*, 1 *Vermont*, 238 ; *Holcomb v. Stimpson*, 8 *Id.* 141 ; *Robinson v. Crenshaw*, 2 *Stew. & Porter*, 276 ; *Maurer v. Mitchell*, 9 *Watts & Serg.* 71 ; and these cases proceed upon the ground of the prosecutions being rather civil in their character.—R.

execution such a purpose. It would be strange if a man could be fined and imprisoned for doing that for which he could maintain an action at law. Every one who gives his aid to such a work, though as a servant, is responsible for the mischief of it.”(x) Upon these and similar reasonings, it has been held, that the first publisher of a libellous or immoral work cannot maintain an action against any person for publishing a pirated edition.(y) Nor will a Court of equity restrain the piracy on the application of the author or publisher, the general rule being, that equity will not give relief of this kind except where a Court of law gives damages.(z)

The greater number of examples of the application of this rule afforded by the books is, where illicit cohabitation or seduction have been brought forward *as the consideration of the contract. These, if [^{*124}] intended to be future, are illegal considerations ;(a) if already past, they are, as formerly explained, no consideration at all.(b) Even the supplying lodgings or clothing to a prostitute for the purpose of enabling her to carry on her practices is illegal, and the creditor cannot recover the price.(c)]

Next with regard to the second class, those namely which are void as contravening public policy. It might perhaps have been more simple to have ranked this and the former as one and the same class, since it is obvious, that wherever a contract has an immoral tendency, there it is opposed to public policy, and the only reason for dividing them into two classes is, that there are

(x) *Poplett v. Stockdale*, R. & M. 337, E. C. L. R. vol. 21.

(y) *Stockdale v. Onwhyn*, 5 B. & C. 173, E. C. L. R. vol. 11.

(z) *Walcot v. Walker*, 7 Ves. 1.

(a) *Walker v. Perkins*, 3 Burr. 1568.

(b) *Bridges v. Fisher*, 23 L. J. (Q. B.) 276.

(c) *Girardy v. Richardson*, 1 Esp. 13 ; *Jennings v. Throgmorton*, R. & M. 251, E. C. L. R. vol. 21 ; *Boury v. Bennet*, 1 Camp. 348.

some contracts which involve no offence against the laws of morality, and nevertheless are opposed to public policy ; such, for instance, are contracts in *general restraint of trade*.

There seems to be nothing obviously immoral in a man's promising or covenanting not to carry on his trade within the limits of England. Nevertheless, such a covenant or promise is totally void. This was decided so long ago as in the reign of Henry V ; in the Year Book of the 2d year of which reign, fol. 5, a [*125] bond restraining a weaver from exercising *his trade was held void : and Judge Hull flew into such a passion at the sight of it, that he swore on the bench, and threatened to send the obligee to prison till he had paid a fine to the King ; upon which Lord Macclesfield observes, in *Mitchell v. Reynolds*,^(d) " that he could not but approve of the indignation the Judge expressed, though not his manner of expressing it." Accordingly, such contracts were declared to be void in that case, and have ever since been held void.

" The law," said Mr. Justice Best, in *Homer v. Ashford*,^(e) " will not allow or permit any one to restrain a person from doing what his own interest and the public welfare require that he should do. Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in the kingdom, is void."

But here arises a distinction, which was first established by Lord Macclesfield, in the celebrated case of *Mitchell v. Reynolds*, before mentioned, which has ever since been upheld. It is, that, though a contract in general restraint of trade is void, one in partial restraint of trade may be upheld ; provided the re-

^(d) 1 P. Wms. 181 ; *Gunmakers' Company v. Fell*, Willes, 328.

^(e) 3 Bing. 328, E. C. L. R. vol. 11.

straint be reasonable, and provided the contract be founded upon a consideration. "It may often happen," continued *Lord .Wynford, then Mr. Justice Best, at the place which I have just cited, [*126] "that individual interest and general convenience render engagements not to carry on trade or act in a profession at a particular place, proper." "Contracts for the partial restraint of trade are upheld," said the Court of Exchequer in *Mallen v. May*, (f) "not because they are advantageous to the individual with whom the contract is made, and a sacrifice *pro tanto* of the rights of the community, but because it is for the benefit of the public at large that they should be enforced. Many of these partial restraints on trade are perfectly consistent with public convenience and the general interest, and have been supported ; such is the case of the disposing of a shop in a particular place, with a contract on the part of the vendor not to carry on a trade in the same place. It is in effect the sale of a goodwill, and offers an encouragement to trade, by allowing a party to dispose of all the fruits of his industry. (g) And such is the class of cases of much more frequent occurrence, and to which this present case belongs, of a tradesman, manufacturer, or professional man taking a servant or clerk into his service, with a contract that he will not carry on the same trade or profession *within certain limits. In such a case the public derives an advantage in the unrestrained [*127] choice which such a stipulation gives to the employer of able assistants, and the security it affords that the master will not withhold from the servant instruction in the secrets of his trade, and the communication of

(f) 11 M. & W. 653.

(g) *Prugnell v. Grosse*, *Alleyn*, 67 ; *Broad v. Jollyffe*, *Cro. Jac.* 569 ; *Jelliott v. Broad*, *Noy*, 98.

his own skill and experience, from the fear of his afterwards having a rival in the same business."

[Examples of what are considered partial restraints of trade are numerous in the books; they are usually partial in respect of time, as not to exercise it for a specified period; or in respect of space, as not to trade within a given district; and in the very instructive case of *Gale v. Reed*,^(h) the contract was not to trade with a certain class of persons in the mode specified, provided the other party traded with them therein. The defendant covenanted not to exercise the business of a ropemaker during his life except on Government contracts, and to employ the plaintiffs exclusively to make all the cordage which should be ordered of him by his connection. The plaintiffs were to allow him 2s. per cwt. on the cordage made by them for such of his connection whose debts should turn out to be good, but were not to be compelled to furnish goods to any whom they were not willing to trust. The Court [*128] *considered that the defendant was not prevented from supplying those of his connection whom the plaintiffs rejected, and consequently that the restraint to follow his trade was partial only. The case of *Chesman v. Nainby*, decided in the House of Lords upon writ of error,⁽ⁱ⁾ in which the agreement was, not to carry on the trade of a linendraper within half a mile of the place where the party was to serve as assistant; that of *Bunn v. Guy*,^(k) where it was, that one attorney in London selling his business to others should not practise as an attorney within London, or 150 miles thereof; and that of *Proctor v. Sargeant*,^(l)

(h) 8 East, 80.

(i) 2 Str. 739; 3 Bro. P. C. 349.

(k) 4 East, 190; *Whittaker v. Howe*, 3 Beav. 383.

(l) 2 M. & Gr. 20, E. C. L. R. 40.

where the servant of a cowkeeper in London engaged not to carry on the same trade as his master within five miles for twenty-four months after the determination of his service,—are very important cases, and, together with the great case of *Mitchell v. Reynolds*, before mentioned, and Mr. Smith's note thereon, should be carefully studied.]

Indeed nothing, as you must be well aware, can be more common upon a dissolution of partnership, than for the retiring partner to covenant that he will not set up the same trade within a certain distance to the injury of the continuing partner. But these restraints must, in order to be upheld, be *reasonable*; that is, a greater *restriction must not be wantonly imposed than can be necessary for the protection [*129] intended.

[In *Horner v. Graves*, (m) 100 miles from the place where a dentist carried on business was considered an unreasonable space from which to exclude an assistant and pupil from practising the same profession after his service was determined and his instruction completed. "We do not see," said Tindal, C. J., in delivering the judgment of the Court of Common Pleas, "how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party. Whatever restraint is larger than the necessary protection of the party can be of no benefit to either, it can only be oppressive, and, if oppressive, it is in the eye of the law unreasonable. Whatever is injurious to the interests of the public is void, on the grounds of public policy. In the case often referred to (*Mitchell v. Reynolds*), Lord Chief Justice Parker says, a restraint to carry

(m) 7 Bing. 735, E. C. L. R. vol. 20.

on a trade throughout the kingdom must be void; a restraint to carry it on in a particular place is good; which are rather instances or examples than limits of the application of the rule, which can only be at last what is a reasonable restraint with reference to the [*130] particular case. In that case the plaintiff had *assigned to the defendant the lease of a house in the parish of A. for five years, and the defendant entered into a bond conditioned that he would not exercise the trade of a baker within that parish during that term; and the restraint was held good, because not unreasonable either as to the time or distance, and not larger than might be necessary for the protection of the plaintiff in his established trade. No certain precise boundary can be laid down within which the restraint would be reasonable and beyond which excessive. In *Davis v. Mason*,⁽ⁿ⁾ where a surgeon had restrained himself not to practise within ten miles of the plaintiff's residence, the restraint was held reasonable. In one of the cases referred to by the plaintiff, 150 miles was considered as not an unreasonable restraint, where an attorney had bought the business of another who had retired from the profession. But it is obvious, that the profession of an attorney requires a limit of a much larger range, as so much may be carried on by correspondents or by agents. And, unless the case was such that the restraint was plainly and obviously unnecessary, the Court would not feel justified in interfering. It is to be remembered, however, that contracts in restraint of trade are in themselves, if nothing more appears to show them reasonable, bad in the eye of the law; and [*131] upon *the bare inspection of this deed, it must strike the mind of every man that a circle

(n) 5 T. R. 118.

round York traced with the distance of one hundred miles incloses a much larger space than can be necessary for the plaintiff's protection." *A fortiori*, where the plaintiff, a coal merchant in London, had taken the defendant into his service as town traveller and collecting clerk, and the defendant agreed that he would not, within two years after leaving the plaintiff's service, solicit or sell to any customer of the plaintiff, and would not follow or be employed in the business of a coal merchant for nine months after he should have left the employment of the plaintiff, the contract was decided to be void, as a restraint of trade unlimited in point of space.^(o) "I cannot express," said Parke, B., in this case, "the rule on this subject better than has been done by Tindal, C. J., in giving the judgment of the Court of Exchequer Chamber in *Hitchcock v. Coker*,^(p) where he says, we agree in the general principle adopted by the Court of Queen's Bench, that, where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require, such restraint must be considered as unreasonable in law, and the contract that would enforce it must be therefore void. Now a restraint prohibiting a party from carrying on trade [*132] within *certain limits of space would be good, and a contract entered into for the purpose of enforcing such an agreement as that would be valid; and the limit of the space is that which, according to the trade he carries on, is necessary for the protection of the party with whom the contract is made." The cases upon this branch of the subject are reviewed by the Court of Exchequer in the great case of *Mallan v.*

(o) *Ward v. Byrne*, 5 M. & W. 548.

(p) 6 A. & E. 454, E. C. L. R. vol. 33.

May, before mentioned; and it may be convenient to the student to subjoin the brief observations made upon them by that Court in giving judgment: (q)—

“Applying this rule and referring to the analogous authorities, it appears to us, that, for such a profession as that of a dentist, the limit of London is not too large. In *Davis v. Mason*, (r) Thetford and ten miles round, in *Hayward v. Young* (s) twenty miles round a place, were held reasonable limits in the case of a surgeon; in that of an attorney, London and one hundred and fifty miles round, in *Bunn v. Guy*; (t) and in *Proctor v. Sargent*, (u) five miles from Northampton Square in the county of Middlesex, was held reasonable in the case of a milkman. And it makes no difference, in our opinion, that it appears on the face of this record that London contains a million of inhabitants. We doubt, indeed, whether the comparative populousness of particular districts ought [*133] to enter into consideration at all; if it did, it would be difficult to exclude others, such as the number of men of the same profession, the habits of the people in that neighborhood, and other matters of a fluctuating and uncertain character, which would produce great difficulty and embarrassment in determining such a question.”

Upon this principle, a covenant not at any time to carry on the business of a butcher within five miles of the place where the covenantor carried it on, before his sale of the business to the covenantee, has been supported as not unreasonable either in respect of time or distance. (v) And in the very recent and important case of *Tallis v. Tallis*, (x) the Court of Queen's

(q) 11 M. & W. 667.

(r) 5 T. R. 118.

(s) 2 Chit. 407, E. C. L. R. vol. 18.

(t) 4 East, 190.

(u) 2 M. & Gr. 20, E. C. L. R. vol. 40.

(v) *Elves v. Crofts*, 10 C. B. 241, E. C. L. R. vol. 70.

(x) 1 Ell. & B. 391, E. C. L. R. vol. 72, S. C.; 22 L. J. (Q. B.) 185.

Bench declared, that any covenant is valid unless it plainly appear that a restriction is imposed by it beyond what the interest of the covenantee requires.]

Further, contracts in restraint of trade must, in order to be good, be founded on a consideration, even although it be made by deed. ["Where one agrees," said Lord Lyndhurst in a remarkable case which is well worthy of attention,(y) "with another to employ him, and the latter agrees not to work for any third person, such agreement is a partial restraint of trade, and must be supported by an *adequate consideration." Thus, in the case of *Hutton v. Parker*,(z) it was held most clearly by the Court of Queen's Bench, that in an action on a bond given by the defendant not to enter into the service of any other than the plaintiff, within ten miles of the town of Sheffield, some consideration must be shown on the declaration, in order to make it good; and the Court refused to presume one. But where an artisan agreed with manufacturers to serve for seven years, and not work for any other without leave; that in times of depression of trade he should be paid part only of his wages, but if ill, another was to be employed in his room; and that they should pay him wages and house rent, but be at liberty to dismiss him on a month's notice: the Court thinking that the manufacturers were bound to employ him for seven years, subject to their power of dismissal, held that there was a good consideration for the artisan's promise to serve them exclusively.(a)]¹

(y) *Young v. Timmins*, 1 C. & J. 339. (z) 7 Dowl. 739.

(a) *Pilkington v. Scott*, 15 M. & W. 657; *Sainter v. Ferguson*, 7 C. B. 716, E. C. L. R. vol. 62. See 1 Smith L. C. 183.

¹ See the note to *Mitchell v. Reynolds*, in 1 Smith's Leading Cases, 430. In this country, the general principle that contracts in restraint

It was at one time thought, that the Courts would enter into the question of the adequacy of this consi-

of trade, so far as they may prevent the exercise of a particular calling are void, has been frequently recognized and enforced, as, for example, a contract never to be engaged in the business of founding iron, *Alger v. Thatcher*, 19 Pick. 51; manufacturing chocolate, *Vickery v. Welch*, Id. 523; wool-carding, *Pyke v. Thomas*, 4 Bibb, 486, and the like, while the exception has been equally established of sanctioning such contracts where the restraint applies only to a particular locality: *Pierce v. Fuller*, 8 Mass. 223; *Pierce v. Woodward*, 6 Pick. 206; *Noble v. Bates*, 7 Cowen, 307; *Palmer v. Graham*, 1 Parson's Eq. Cases, 476. It is stated in the text that the later English cases show an unwillingness to enter into the question of adequacy of consideration, and a strong instance of this may be seen in the very recent case of *Atkyns v. Kinnier*, 4 Excheq. 776, where the defendant bound himself in the sum of £1000, as liquidated damages, not to practise as a physician within two miles and a half of a certain place. He did practise a few feet within that distance, measuring by a less frequented road than the usual thoroughfare, though by the latter he was beyond that distance, and there was no evidence that the plaintiff had sustained any damage from his having done so. The jury having, under the direction of the Court, found a verdict for £1000, the Court of Exchequer discharged a rule to reduce the damages to a shilling, and held that the defendant must abide by the contract he had made. But in New York, it has been held, that, *prima facie*, the law presumes even limited restraints on trade to be void, and that they will only be upheld upon sufficient proof of their reasonableness, both as to consideration and usefulness: *Chapel v. Brockway*, 21 Wendell, 158; *Ross v. Sadgbeer*, Id. 166. In the latter case, to a declaration on a bond conditioned that the defendant should not manufacture pearl ash for 10 years, nor within forty miles of a certain place, a general demurrer was sustained by the Court, on the ground that the consideration imported by the seal did not afford a presumption of such circumstances and reasons as were requisite to uphold such a contract. Prior and subsequent decisions in that State have not, however, observed such a rule, and an agreement not to practise as a physician within six miles or pay \$500 for every month of such practice, *Smith v. Smith*, 4 Wendell, 468; and an agreement not to set up a rival newspaper, or pay \$3000, *Dakin v. Williams*, 17 Wend. S. C. in error, 22 Id. 201, were respectively

deration, and would hold the contract void if the consideration were inadequate. However, it has lately been decided in the Exchequer Chamber,^(b) [*135] *after great consideration, that the question of adequacy or inadequacy cannot be entertained, but that the parties must judge of that for themselves ;^(c) a doctrine you may remember my citing as a strong instance of the unwillingness of the Courts to enter into the question of the *adequacy of consideration* at all.

[The reason of this last rule is very succinctly expressed by Alderson, B., in *Pilkington v. Scott*, above referred to: "Before the decision in *Hitchcock v. Coker*," he says, "a notion prevailed, that the consideration must be adequate to the restraint ; that was, in truth, the law making the bargain, instead of leaving the parties to make it, and seeing only that it is a reasonable and proper bargain."]

Another example of contracts illegal because in contravention of public policy, is afforded by those cases in which contracts in general restraint of marriage have been held void. Thus, in *Lowe v. Peers*,^(d) a defendant entered into the following covenant :—"I

(b) *Mallan v. May*, 11 M. & W. 653, 13 M. & W. 511 ; *Price v. Green*, 13 M. & W. 695 ; *Green v. Price*, 16 M. & W. 346.

(c) *Ante*, p. 95 et seq. ; *Archer v. Marsh*, 6 A. & E. 966, E. C. L. R. vol. 33 ; *Hitchcock v. Coker*, *Id.* 430.

(d) 4 Burr. 2225.

enforced, and the sums named held to be liquidated damages and not a penalty.—R.

A contract in general restraint of trade is void ; but if in partial restraint of trade only, it may be supported, provided the restraint be reasonable, and the contract be founded on consideration. *Holmes v. Martin*, 10 Georgia, 503 ; *Bowser v. Bliss*, 7 Blackford, 344 ; *Butler v. Burleson*, 16 Vermont, 176 ; *Webb v. Noah*, 1 Edwards Ch. Rep. 604 ; *Alger v. Thacher*, 19 Pickering, 51.

do hereby promise Mrs. Catherine Lowe that I will not marry any person besides herself. If I do, I agree to pay her 1000*l.* within three months after I shall marry anybody else." The Court of Queen's Bench held this contract void, remarking, "that it was not a [*136] promise to marry *her, but not to marry any one else, and yet she was under no obligation to marry him." This case was affirmed in error.(*e*)

So, where a lady gave a bond conditioned not to marry, the Court of Chancery ordered it to be delivered up.(*f*)

On the subject of marriage I may further mention, that a deed tending to the *future* separation of husband and wife is *void* on grounds of public policy ;(*g*) although a deed providing a fund for the lady's support on the occasion of an *immediate* separation is not so.(*h*) [And the Court of Chancery will exercise its jurisdiction in giving effect to arrangements of property contained in articles of separation, such separation having previously taken place,(*i*) and will restrain the husband from doing any act contrary to his covenant in such articles, not to molest his wife.(*k*) And even where the parties, after executing a lawful deed of separation, have been reconciled and have cohabited, the deed is not necessarily annulled thereby ;(*l*) but a Court of equity will compel performance of covenants therein, if it appear that such reconciliation was not

(*e*) 4 Burr. 2234.

(*f*) Baker v. White, 2 Vern. 215.

(*g*) Hindley v. Marquis of Westmeath, 6 B. & C. 200, E. C. L. R. vol. 13.

(*h*) Jee v. Thurlow, 2 B. & C. 547, E. C. L. R. vol. 8 ; Jones v. Waite, in Dom. Proc. 4 M. & Gr. 1104, E. C. L. R. vol. 43.

(*i*) Wilson v. Wilson, 1 H. L. Cas. 538.

(*k*) Sanders v. Rodway, 22 L. J. (Chanc.) 230.

(*l*) Wilson v. Musket, 3 B. & Ad. 743, E. C. L. R. vol. 23.

*intended to annul them.(*m*)] The distinction [*137] between the two cases of future and existing separation is obvious. The deed, in the former case, contemplates and facilitates that which the law considers an evil, namely the separation of husband and wife; in the latter case, the evil is inevitable, and the effect of the deed is but to save the wife from destitution.

Almost the converse of these cases of deeds of separation are what are called—

Marriage brocage contracts, that is, where a man has agreed, in consideration of money, to bring about a marriage. These are all void as against public policy, the law considering that unions so brought about are unlikely to be happy ones. This class of cases is founded upon a case in the House of Peers,(*n*)¹ in which Thomas Thinne gave an obligation of 1000*l.* to Mrs. Potter, conditioned to pay her 500*l.* within three months after he should be married to Lady Ogle, “a widow,” the reporter says, “of great fortune and honor,

(*m*) Webster v. Webster, 22 L. J. (Chanc.) 837.

(*n*) Hall v. Potter, 3 Lev. 411.

¹ Hall v. Potter (which is also reported in 1 Eq. Ca. Ab. 89, and 3 P. Wms. 76, and Shower's Parl. Cas. 76) has been followed by a numerous class of cases: Cole v. Gibson, 1 Vesey, 503; Roberts v. Roberts, 3 P. Wms. 74, see Mr. Cox's note; Smith v. Bruning, 2 Vern. 392; Duke of Hamilton v. Lord Mahon, Id. 652; Boynton v. Hubbard, 7 Mass. 112; and Lord Redesdale, when Chancellor of Ireland, declared void a bond given to the obligee as a remuneration for having assisted the elopement of the obligor without the consent of the wife's friends, though the bond was given voluntarily after the marriage, and without any previous agreement therefor. Williamson v. Gihon, 2 Sch. and Sef. 362. The civil law, however, it is well known, in its approval and encouragement of the institution of marriage, allowed the *proxenetæ*, or match-makers, to stipulate, within limits, for a reward for promoting marriages. Code, Lib. 5, tit. 1, l. 6.—R.

for she was the daughter and heir of Jocelyn Percy, Earl of Northumberland." The Master of the Rolls decreed this bond to be void; the Lord Keeper reversed the decree; whereupon there was an appeal to the House of Peers; and, upon hearing the cause there, all the Lords but three or four were of opinion that all [*138] such contracts are of dangerous *consequences, and ought not to be allowed; and they reversed the decree of dismissal made by the Lord Keeper, and decreed the obligation to be void. .

Another, and an extensive class of cases is that in which the contract has a tendency to obstruct the course of public justice. These must be left for the next Lecture.

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ILLEGAL CONTRACTS.—FRAUD.—USURY.—GAMING AND
HORSE RACING.—WAGERS.

As a considerable time has intervened since the last lecture, and as it is quite necessary, in order to the thorough understanding of a subject, particularly so complex a one as the present, to bear the arrangement of its parts clearly in mind, I shall commence this lecture by recapitulating the topics which I have already discussed, and pointing out how much of the subject remains to be considered.

I stated in the first lecture the general division of Contracts into contracts *of record*, by *specialty*, and *simple contracts*. I then enumerated the differences by which these classes of contracts are distinguished from one another, and the peculiarities of each of them; I then touched on the practical distinction which exists between a simple contract by mere words and one reduced to writing, and the further distinction between those cases in which the adoption of a writing is optional, and those in which its adoption is rendered necessary by the provisions of some Act of Parliament, and particularly of the Statute of Frauds in the cases to which it applies. I then proceeded to explain the nature of the *consideration* which the law requires*in order [*140] to support a simple contract, and to touch on the distinction which exists between executed and executory considerations. Then, leaving the separate

consideration of simple contracts, and turning to those points which apply to all contracts whatever, I arrived, in the last lecture, at the effect of *illegality* upon the contract. I pointed out the principle upon which illegality tainting either the consideration or the promise is held to vitiate every description of contract, and I then stated to you the subdivision of illegal contracts into two classes: 1st, those which are so at common law; 2dly, those which are rendered so by the provisions of some statute. With regard to the former of these two classes, namely, contracts illegal at common law, I explained that a contract *illegal* at common law is so on one of three grounds: 1st, that it violates the rules of morality; 2dly, that it is opposed to public policy; or, 3dly, that it is tainted by fraud.

I exemplified the first of these three classes by the case of *Fores v. Johnes*, before mentioned, in which the print-seller was not permitted to recover on a contract for the sale of libellous publications; and I adduced several instances of the second class of contracts illegal at common law, those which are so because opposed to public policy, in cases, namely, where the contract is in general restraint of trade, or creates a restraint of trade which, though not general, is unreasonable in its extent, [*141] *as being larger than the protection of the person who imposes it requires; contracts in general restraint of marriage; contracts tending to facilitate the *future separation* of husband and wife; and contracts to bring about marriage for a reward, or as they are called for *brocage* of *marriage*. There is another remarkable instance of contracts falling under this class, namely, of illegality created by the rules of common law, which it will be right to specify before proceeding to the next branch of the subject. It consists of contracts, void, because having a tendency to obstruct the administra-

tion of justice. Such was the very contract in *Collins v. Blantern*,^(a) before mentioned, the case which first established that the person who has executed a deed is not estopped from showing, by way of defence, that it was so executed for an illegal consideration, although he would not have been allowed to defend himself on the ground that there was no consideration for it at all. In that case, five persons were indicted for perjury, and it was agreed that Collins, who was their friend, should buy off the prosecutor's evidence by giving him a note for 350*l.*, in consideration of which he undertook not to appear at the Assizes. And it was further agreed, that, in order to indemnify Collins against the consequences of his being called upon to pay the note, Blantern should give Collins his bond conditioned *for the payment of 350*l.*, the same sum [*142] for which the note was made. In an action brought upon the bond, the Court of Common Pleas held that it was void, and that a plea showing the consideration on which it was given was a good answer to the action. There is a late case of *Unwin v. Leaper*,^(b) which involves the same principle. [There, an action of ejectment had been brought by Unwin against Leaper, when the latter gave notice of his intention to sue Unwin for certain statutable penalties incurred by him. Thereupon it was arranged, that the action of ejectment should be dropped, that Unwin should pay down 50*l.* towards Leaper's expenses in that action, and that Leaper should not proceed with the suit for the penalties; and the Court of Common Pleas held that the 50*l.* might be recovered back as a payment made in order to compromise a penal action. In another instance,^(c)

(a) 2 Wils. 341.

(b) 1 M. & Gr. 747, E. C. L. R. vol. 39.

(c) *Fivaz v. Nicholls*, 2 C. B. 501, E. C. L. R. vol. 52. See *Simpson v. Bloss*, 7 Taunt. 246, E. C. L. R. vol. 2.

where one of two parties to an agreement to suppress a prosecution for embezzlement, sued the other for an injury indirectly arising out of that agreement, he was not allowed to maintain the action; and it appears in this case, that where a man cannot make out a claim connected with an illegal transaction, to which he is a party, except through that transaction, such claim cannot be effectuated in a Court of law. Of the soundness [*143] of *these decisions, to use the words of the Court of Queen's Bench in speaking of that in *Collins v. Blantern*, no doubt can be entertained, whether the party accused were innocent or guilty of the crime charged. If innocent, the law was abused for the purpose of extortion; if guilty, the law was eluded by a corrupt compromise, screening the criminal for a bribe. (d)¹

(d) *Keir v. Leeman*, 6 Q. B. 316, E. C. L. R. vol. 51.

¹ Thus, no action will lie on a contract to procure the appointment of clerk of a court, or any office relating to the administration of justice: *Haralson v. Dickens*, 2 Car. Law Reps. 66; *Lewis v. Knox*, 2 Bibb, 453; *Carlton v. Whiteher*, 5 New Hamp. 196; *Proprietors v. Page*, 6 Id. 183; or to promote the election of a candidate for office: *Swayze v. Hull*, 3 Halsted, 54; *Dearborn v. Bowman*, 3 Met. 135; *Duke v. Asbee*, 11 Iredell, 112. So of the procuring or defeating by improper means or personal influence the passage of an act of the legislature: *Wood v. M'Cann*, 6 Dana, 366; *Clippenger v. Hepbaugh*, 5 Watts & Serg. 315; or the use of interest to procure the pardon of a convict: *Norman v. Cole*, 3 Esp. 253; *Hatzfield v. Gulden*, 7 Watts, 152.

So, where in contemplation of an assignment for, or composition with creditors, or of bankruptcy, an agreement whereby one creditor is to receive more than the others, cannot, if unknown to the rest, be enforced: *Jackson v. Lomas*, 4 Term, 169; *Smith v. Cuff*, 6 Maule & Sel. 160; *Baker v. Matlack*, 1 Ashmead, 68; *Mann v. Darlington*, 3 Harris, 312; (see *Bradshaw v. Bradshaw*, 9 Mees. & Welsb. 28, and *Horton v. Riley*, 11 Id. 492, as to the debtor's right to recover back money so paid, which right is distinguished from the principle *in pari delicto, potior est conditio defendentis*, on the ground of

It is convenient, however, to introduce here the exception, that, in some instances, indictments for mis-

advantage being taken of the debtor's circumstances to exercise oppression over him.)

A class of cases, however, should be here referred to as of constant occurrence. These depend on contracts based on a compromise or compounding of some offence. It is well settled that an agreement to compound a felony will not be enforced, and any security based upon such a consideration will be void ; on the other hand, some prosecutions for misdemeanor, as for example, for bastardy : *Holcomb v. Stimpson*, 8 Verm. 144 ; *Maurer v. Mitchell*, 9 W. & S. 71 ; *Robinson v. Crenshaw*, 2 Stew. & Porter, 276 ; or, for assault and battery, *Price v. Summers*, 2 Southard, 578 (unless when coupled with a riot : *Keir v. Leeman*, 6 C. B. 308, 51 E. C. L. R., in error, 9 Id. 371, 58 E. C. L. R. ; or with an intent to kill : *Gardiner v. Maxey*, 9 B. Monroe, 90), are allowed to be compromised by the parties, and to form a valid consideration for promises based on such compromise. Where, however, the relation of debtor and creditor has existed between the parties, the compromise of prosecutions for secreting property, for obtaining money under false pretences, and the like, is, if not held to form an illegal consideration (as it was in the late case of *Shaw v. Reed*, 30 Maine, 105), at least looked upon with the strongest disfavor, as affording a ready instrument to abuse and oppression. *Prough v. Entriken*, 1 Jones (Pa.), 81. The result of the authorities generally upon this subject appears to be, that where the misdemeanor is one in which the welfare of society is immediately concerned, agreements based upon their compromise will not be sanctioned (and its having been done originally by the leave of the Court makes no difference, *Keir v. Leeman*, 9 Q. B. 394), but the rigor of the rule will be relaxed in proportion as the general welfare ceases to be interested, and the offence and its punishment becomes personal between the parties, and still more as the prosecution loses a criminal complexion, and assumes a civil one. In perhaps the most recent prominent case in England, *Keir v. Leeman*, *supra*, which went on error from the Queen's Bench to the Exchequer Chamber, Chief Justice Tindal, in delivering the opinion of the latter tribunal, said, that if the matter were *res integra*, they would have no doubt in holding that any compromise of any misdemeanor, or any public offence, was an illegal consideration to support a promise, and that it was remarkable what very little authority, consisting rather of dicta than decision, there was to support such considerations. " We have no doubt that in all offences which involve damages to an injured party for which he may maintain an action, it

demeanors may be compromised. It is well known, that the party committing some private injuries may be indicted for a misdemeanor: a remedy necessary for the party injured, who, if he could proceed by action only, would be in fact remediless in cases where the defendant could not pay the damages recovered. In many such cases, it can hardly be admitted that a prosecution is to be considered public, or that the public interest is concerned in bringing such an offender to justice by way of example to others. Substantially, the only one who suffers by the wrong, is the individual against whom it is committed. In instances of this kind, the law does not forbid a compromise between the injurer and the injured. "The law," says the Court of Queen's Bench, in *Keir v. Leeman*,^(e) "will permit a compromise of all [*144] offences, *though made the subject of a crimi-

(e) 6 Q. B. 321, E. C. L. R. vol. 51.

is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit. It is said, indeed, that in the case of an assault he may also undertake not to prosecute on behalf of the public. It may be so, but we are not disposed to extend this any further." And the current of more recent authorities on this side of the Atlantic, sets strongly against the validity of such considerations. *Clark v. Ricker*, 14 New Hamp. 44; *Commonwealth v. Johnson*, 3 Cush. 454; *Gardner v. Maxey*, 9 B. Monroe, 90.—R.

Where two persons apply to the Governor of the State to be appointed to the same office, and it is agreed that one of them shall withdraw his application and aid the other in procuring the appointment, in consideration of which the fees and emoluments of the office are to be divided between them, such contract is illegal and void. *Gray v. Hook*, 4 Comstock, 449. So no action will lie for services as agent in attending to a claim against the State, before the legislature, agreements in respect to such services being against public policy, and prejudicial to sound legislation; nor can a recovery be had in such a case on a *quantum meruit*, there being no legal service performed. *Harris v. Roop*, 10 Barbour Sup. Ct. 489.

nal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it." The law will therefore sanction a bond, conditioned to remove a public nuisance, founded on the abandonment of an indictment for that nuisance, which is in fact a very common instance of compromise.(f) The compromise of indictments for assaults is another frequent instance of the same rule.(g) But if, as in *Keir v. Leeman*, the offence is not confined to personal injury, but is accompanied with riot and the obstruction of a public officer in the execution of his duty, these are matters of public concern, and therefore not legally the subject of a compromise.]

The case of *Coppock v. Bower*(h) is another instance of the before-mentioned principle. In this case an agreement to withdraw an election petition in consideration of a sum of money was held void.(i) The case of *Arkwright v. Cantrell*(k) is another instance, where the grant of a judicial office to a person interested in the *matters which would become the subject of adjudication was held void. [*145]

[For a similar reason, contracts to induce voters, for any consideration of advantage to themselves, to vote in favor of a particular candidate, are illegal and void. Thus, when a candidate himself makes a contract with any one to supply meat and drink to electors, it is void; and if the things be supplied, the person

(f) *Fallowes v. Taylor*, 7 T. R. 475.

(g) *Baker v. Townsend*, 7 Taunt. 422, E. C. L. R. vol. 2.

(h) 4 M. & W. 361.

(i) *Ante*, p. 13.

(k) 7 Ad. & E. 565, E. C. L. R. vol. 34; *Dimes v. Grand Junction Canal Co.* 3 H. of L. Cas. 759.

supplying cannot recover the price from the candidate: (l) for, by the policy of the law, the electors should be free to use their own unbiassed judgment in selecting the candidate most fit to serve the public as a member of the great council of the nation. Persons who have the right of appointing to public offices of trust or to any favor from the Crown, are bound to use a like discrimination. All agreements, therefore, to pay money for an appointment to any public office of trust, or for the grant of any public favor, are illegal. (m)]

Agreements to indemnify persons against the consequences of illegal acts fall within the same rule as contracts directly to obstruct the administration of justice. (n)¹ So also do all promises which are made to obtain release from duress of person by illegal arrest, or under compulsion of colorable legal process,

(l) *Thomas v. Edwards*, 2 M. & W. 218.

(m) *Parsons v. Thompson*, 1 H. Bl. 323; *Hopkins v. Prescott*, 4 C. B. 578, E. C. L. R. vol. 56; *Harrington v. Du Chatell*, 1 Bro. C. C. 124.

(n) *Shackell v. Rosier*, 2 Bing. N. C. 634, E. C. L. R. vol. 9.

¹ *Mitchell v. Vance*, 5 Monroe, 529; unless the illegal act is *already done*, in which case, the agreement to indemnify is no encouragement to do *future* harm: *Haskett v. Tilley*, 11 Modern, 93; *Kneeland v. Rogers*, 2 Hall (N. Y.), 587. Thus a bond given to a sheriff to indemnify him against a voluntary escape which *had* happened is valid, though if given in anticipation of such an escape it would fall within the general rule: *Given v. Driggs*, 1 Caines, 450; *Doty v. Wilson*, 14 Johnson, 381; and these cases, it will be perceived, are analogous in principle to those which, while holding to be invalid bonds executed in consideration of a *future* separation between husband and wife, yet enforce such instruments where the separation is to be immediate, or has already taken place.—R.

An agreement to indemnify a sheriff for an act to be done by him in plain violation of his official duty, is invalid; but such an agreement, in the case of a disputed right, is lawful. *Shotwell v. Hamblin*, 23 Mississippi, 156.

whereby it is made the *instrument of oppression or extortion; but not where the arrest [*146] was legal: (o) and for similar reasons money extorted by duress of the plaintiff's goods, and paid by him under protest, may be recovered back. (p)¹

[Maintenance and champerty are so often talked of as contracts having an illegal object and consideration, that they seem to require a slight allusion here. For one who has no interest in the subject of a suit, and no just right to interfere in it, to aid by money or otherwise the parties interested, is maintenance and is forbidden by the law, whose policy has always been to discourage disputes and litigation. A contract therefore by him to aid in such an object is void; but a man who has an interest in the cause, or reasonably thinks he has, is not guilty of maintenance if he prosecutes it in common with others, and his agreement so to do is good. (q) If, having no interest, his object be to share in the fruits of the action, this is champerty. (r) If, therefore, an attorney agrees not to charge his clients costs, in consideration of having for himself a proportion of what he may recover for them,

(o) See *The Duke de Cadaval v. Collins*, 4 A. & E. 858, E. C. L. R. vol. 31; *Cumming v. Hooper*, 11 Q. B. 112, E. C. L. R. vol. 63.

(p) *Ashmole v. Wainwright*, 2 Q. B. 837, E. C. L. R. vol. 42; *Wakefield v. Newton*, 6 Q. B. 276, E. C. L. R. vol. 51; *Fearnley v. Beanson*, 20 L. J. (Q. B.) 178.

(q) *Findon v. Parker*, 11 M. & W. 675.

(r) *Williams v. Protheroe*, 3 Y. & J. 129; *Stanley v. Jones*, 7 Bing. 369, E. C. L. R. vol. 20.

¹ It is no objection to the validity of a contract fairly entered into, where no advantage was sought or taken by the other party, that at the time of entering into it he was under arrest; but where legal process has been used as a means of oppression and to extort disadvantageous terms from a party in custody, instruments of writing so obtained will be set aside. *Stebbins v. Niles*, 25 Mississippi, 267; *Wells v. Barnett*, 7 Texas, 584; *Smith v. Atwood*, 14 Georgia, 402.

[*147] this *agreement is champerty, and consequently illegal and void.^(s) It is worth observing that it is mainly for the purpose of avoiding maintenance that the rule of our law forbidding the assignment of choses in action has been established,^(t) a rule which, as the law admits the assignee to sue in the name of the assignor, seldom interferes with the liberty required by trade and commerce; and, by keeping up the remembrance that the assignee can have no rights to the thing assigned other than those possessed by the assignor at the time of the assignment, serves to prevent many inconveniences which might arise, were all choses in action as negotiable as bills of exchange.]

[Agreements contravening the ends and objects of the enactments of the Legislature, or, as it is most commonly expressed, the policy of those enactments are void. And this class of illegality is properly arranged with other instances of illegality by the common law, because it does not consist in the breach of any enactment of a statute, but violates the principle of the common law, which is to carry into effect the intent and object of the Legislature. The most common instances of this illegality are afforded by agreements to give a creditor of a bankrupt or insolvent [*148] more than his *equal share of the bankrupt's or insolvent's estate, which it is the object of the Bankrupt and Insolvent Acts to divide equally amongs his creditors.^(u)

(s) *Re Masters*, 4 D. P. C. 21, per Coleridge, J.; *Ex parte Yeatman*, Id. 304, 510. (t) *Co. Litt.* 214, a; *Shep. Touch.* 240.

(u) *Staines v. Wainwright*, 6 Bing. N. C. 174, E. C. L. R. vol. 37; *Davis v. Holding*, 1 M. & W. 159; *Tabram v. Freeman*, 2 C. & M. 451; see *Nerot v. Wallace*, 3 T. R. 17, a very instructive case; *Murray v. Renn*, 8 B. & C. 421, E. C. L. R. vol. 15.

[The Apothecaries Act requires that a student, previously to being admitted to examination for the purpose of obtaining his certificate to practise as an apothecary, should have served an apprenticeship for five years. Where the father of a student agreed with an apothecary to take his son as apprentice for two years, but to antedate the articles, so that it should seem that he had been apprenticed for the legal term of five years, in order, that, at the expiration of two years only, he might be admitted to his examination, and gave the apothecary a bond to secure the payment of a premium stipulated to be given upon such apprenticeship, the Court of Common Pleas held that the bond was clearly void.(v)

[Lastly, all contracts between British subjects and alien enemies, not having a license to trade with this country, are void, and cannot be enforced, even upon the return of peace;(w) although, if the contract had been made before the war *between their [*149] respective countries began, they may sue upon it when peace is restored.(x)]

[In the cases lately referred to, so much is said of the policy of the law and public policy, that it is desirable to add a few words in explanation of them. They have been used to express an important principle from very early periods,(y) and one of the most important cases of very modern times has been decided upon grounds of public policy.(z) They are, however, used indiscriminately in many of the cases, although

(v) *Prole v. Wiggins*, 3 Bing. N. C. 230, E. C. L. R. vol. 32.

(w) *Kensington v. Inglis*, 8 East, 273; see *Potts v. Bell*, 8 T. R. 548.

(x) *Alcenius v. Nygrin*, decided in Queen's Bench, 14th Nov. 1854.

(y) *Shep. Touch.* 132; *Co. Litt.* 206 b.

(z) *Egerton v. Brownlow*, 4 H. of L. Cas. 1.

perhaps the phrase "policy of the law" indicates more correctly the sense in which the terms are used in law, than the words "public policy." Whichever form is employed, two distinct classes of things are referred to by them. Sometimes they indicate the spirit of a law as distinguished from the letter of it; as when it is said that contracts made by a trader, giving a preference to particular creditors, although not forbidden by the letter of any enactment, violate the policy of the bankrupt laws, the first object and policy of those laws being to make a ratable distribution of the bankrupt's property amongst all his creditors.^(a) In this sense the words are also used, when, in construing a particular law, the Judges look at the object and policy with which it was framed and the evil it was *apparently intended to remove.^(b) They use the policy of a particular law as a key to open its construction.

[At other times, these expressions indicate a principle of law, which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good.^(c) If this be understood as the public good, recognized and protected by the most general maxims of the law and of the constitution, it furnishes a rule much more general than the first class, yet definite in its terms, and clearly distinguishable from that class of public policy or political expediency, which would comprise such questions, as, whether it is wise to have a sinking fund or a paper circulation, and which would properly guide the Legislature or the executive government in determining any question which they might have to deal with.

(a) Id. 87, per Cresswell, J.

(b) Id. 107, per Alderson, B.

(c) Id. 196, per Lord Truro.

[It would seem that all the cases which have been decided upon the ground of public policy are referable to one or other of the two classes above mentioned; and perhaps this section of law cannot be summed up in a way more satisfactory to the reader than by quoting the words of Parker, C. J., in the famous case of *Mitchell v. Reynolds*,^(d) "All the instances of a condition against law in a proper sense are reducible under one of these heads: 1st, either to do something that is *malum in se* or **malum prohibitum*; [*151] 2dly, to omit the doing of something that is a duty; 3dly, to encourage such crimes and omissions. Such conditions as these, the law will always, and without regard to circumstances, defeat, being concerned to remove all temptations and inducements to those crimes." For, when the letter of the law forbids to do anything which is *malum in se* or *malum prohibitum*, and prescribes the performance of all which it considers as a duty, it may well be thought that public policy or the policy of the law forbids to do anything which may encourage the wrong or deter from the duty.]

The instances which I have mentioned, are those in which illegality at common law is most frequently set up for the purpose of invalidating a contract. To these must be added the third class of cases which I specified: those namely, in which the contract is avoided on the ground of fraud; that is, deceit practised upon the contracting party, in order to induce him to enter into it. [As to the deceit, it may be of an active kind, as falsehood and misrepresentation,^(e) actually

^(d) 1 P. Wms. 189.

^(e) *Taylor v. Ashton*, 11 M. & W. 400; *Barley v. Walford*, 9 Q. B. 196, E. C. L. R. vol. 58; *Barnes v. Pennell*, 2 H. L. Ca. 497; *Gerhard v. Bates*, 22 L. J. (Q. B.) 367; 2 E. & B. 476, S. C., E. C. L. R. vol. 75.

used by one party for the purpose of deceiving the other; or it may be passive, as where a vendor knows that a purchaser labors under a delusion, which he also knew was influencing his judgment in favor of purchasing, and suffers*him to complete his purchase [*152] *under that delusion.(f) If the representation be not known to be false by the utterer of it, or be not used with intent to deceive, it will not amount to fraud, although really false.(g) This deceit, moreover, must also actually induce the contracting party to enter into the contract. If he contracted, not believing it, or trusting to his own judgment, and not to the representation, he cannot avoid this contract on account of the falsehood.(h)]¹ This is so very well-

(f) *Hill v. Gray*, 1 Stark. 434, E. C. L. R. vol. 2; see *Keates v. Lord Cadogan*, 20 L. J. (C. P.) 76.

(g) *Evans v. Collins*, 5 Q. B. 804, 820, E. C. L. R. vol. 48; Ex. Ch. in error; *Ormrod v. Huth*, 14 M. & W. 651; *Thom v. Bigland*, 22 L. J. (Exch.) 243; 8 Exch. 725, S. C.

(h) *Moens v. Heyworth*, 10 M. & W. 147; *Shrewsbury v. Blount*, 2 M. & Gr. 475, per Tindal, C. J.

¹ It is in fact no more than an application of the maxim *simplex commendatio non obligat*. Thus Lord Brougham said, in delivering his judgment in the House of Lords, in the great case of *Small v. Atwood*, 6 Clark v. Finelly, that the inference he drew from the authorities was that "general fraudulent conduct signifies nothing; that general dishonesty of purpose signifies nothing; that attempts to overreach go for nothing; that an intention and design to deceive may go for nothing; unless all this dishonesty of purpose, all this fraud all this intention and design, can be connected with the particular transaction, and not only connected with the particular transaction, but must be made to be the very ground upon which this transaction took place, and must have given rise to this contract. If a mere general intention to overreach were enough, I hardly know a contract, ever between persons of very strict morality, that could stand. We generally find the case to be, that there has been an attempt of the one party to overreach the other, and of the other to overreach the first

known a point, and one of such continual recurrence in practice, that it is useless to multiply examples of

but that does not make void the contract." It has therefore been held, that mere general statements of what property would thereafter be worth, afforded no ground for rescission of the contract, the matter being fully within the vendee's own calculation : *Donelson v. Weakley*, 3 Yerger, 178 ; and so of any other general representation, open to examination : *Stray v. Peters*, 2 Root ; *Bell v. Henderson*, 6 Howard (Miss.), 311 ; *Anderson v. Hill*, 12 Sm. & Mar. 683 ; *Taylor v. Fleet*, 4 Barbour's S. C. R. 95 ; *Foley v. Cowgill*, 5 Blackford, 18. But it must also be observed, that although the subject of the false statement may be one within the vendee's own range of inquiry, yet if the statement is designedly made in order to prevent such inquiry, the rule is otherwise. Thus in *Dobell v. Stevens*, 3 Barn. & Cres. 623, 10 E. C. L. R., in the negotiation of the sale of the lease and good-will of a public house, a false representation was made by the vendor with respect to the quantity of beer drawn during a certain period. The books were in the house, and it was part of the defendant's case that the plaintiff might have had access to them, but, notwithstanding that fact, the Court of King's Bench held that an action for damages, might under such circumstances be sustained ; and the same principle will be found applied in the case of *Hunt v. Moore*, 2 Barr, 107 ; *Napier v. Elam*, 6 Yerger, 108 ; *Campbell v. Whittingham*, 5 J. J. Marsh, 96, Buford v. Caldwell, 3 Missouri, 477.

It was said, in perhaps the most recent English case on this subject (*Watson v. Poulson*, 7 Eng. Law & Eq. R. 588), that "the telling an untruth, knowing it to be an untruth, with intent to induce a man to alter his condition, and his altering his condition in consequence, whereby he sustains damage, fulfil all the requisites to support an action for deceit." The question then arises, how much less, if anything, than this, will be sufficient for that purpose.

The recent cases in England (of *Collins v. Evans*, 5 Q. B. 120, 48 E. C. L. R. ; *Moens v. Heyworth*, 10 M. & W. 147 ; *Taylor v. Ashton*, 11 Id. 401 ; and *Ormrod v. Huth*, 14 Id. 651, the doctrine of which cases was approved in the Exchequer Chamber, in *Barley v. Walford*, 9 Q. B. 197, 58 E. C. L. R.), have now decisively settled, in accordance with reason and previous authority, that in order to support an action on the case for fraudulent representations, it is not sufficient to show that a party made statements which he did not know to be true, and which were in fact false. Thus, in *Evans v. Collins*

its application. As to the *mode* in which the defence of fraud is set up and rebutted in a Court of law, you

(when in the Court of Queen's Bench), the defendants having pleaded that they had reasonable and probable cause to believe, and did believe their representation to be true, viz., as to the identity of a particular person who was to be arrested on a *capias*, the jury found for them on that plea, and when the court (which in the previous case of *Fuller v. Wilson*, 3 Q. B. 58 (reversed in the Exchequer Chamber, on another point in *Id.* 68, 1009), had taken a different view from that entertained by the majority of the Court of Exchequer) entered judgment for the plaintiffs, *non obstante veredicto*, that judgment was reversed by the Exchequer Chamber, which held that the verdict on the issue raised by that plea was material; and the propriety of the reversal seems to have been, in the recent case of *Barley v. Walford*, 9 Q. B. 206, 58 E. C. L. R., acquiesced in by Lord Denman, who had delivered the opinion which was reversed. "We must admit," said he, "the reasonableness of the doctrine there at length laid down. For if every untrue statement which produces danger to another, would found an action at law, a man might sue his neighbor for any mode of communicating erroneous information, such, for example, as having a conspicuous clock too slow, since the plaintiff might be thereby prevented from attending to some duty or acquiring some benefit. A doctrine creating legal responsibility in cases so numerous and so free from blame, must be restrained within some limits." Hence the result of these authorities is, that in order to make a party liable on the ground of fraud, there must be fraud as distinguished from mere mistake, and to such a conclusion the reason and weight of American authority also tends: *Russell v. Clark*, 7 Cranch, 69; *Young v. Cavell*, 8 Johns. 25; *Hammatt v. Emerson*, 27 Maine, 309; *Weeks v. Burton*, 7 Vermont, 67; *Ewings v. Calhoun*, *Id.* 79; *Lord v. Colley*, 6 New Hampshire, 99; *Allen v. Addington*, 7 Wendell, 10; *S. C.* 11 *Id.* 375; *Tryon v. Whitemarsh*, 1 Metcalf, 1; *Ball v. Sively*, 1 Dana, 370; *Smith v. Babcock*, 2 Woodbury & Minot, 246; and in a recent case, which has appeared while these sheets are going through the press, the Supreme Court of the United States have distinctly affirmed the same doctrine, after most of the late English decisions referred to had been cited in argument. "The gist of the action," said the court, "is fraud in the defendants, and damage to the plaintiff. Fraud means an intention to deceive. If there was no such intention, if the party honestly stated his own opinion, believing, at the time, that he

may refer to *Edwards v. Brown*,⁽ⁱ⁾ and *Gale v. Williamson*.^(k)

⁽ⁱ⁾ 1 C. & J. 307.

^(k) 8 M. & W. 405.

stated the truth, he is not liable in this form of action, although the representation turned out to be entirely untrue." *Lord et al. v. Goddard*, 13 Howard, 198-211.

The position of a defendant may however be such, that without the utterance of what is known to him to be an actual falsehood, he may still be liable in an action for deceit, viz., where he states material facts *as of his own knowledge* (and not as mere matter of opinion or general assertion), about which he has *no knowledge whatever*. Here it is held that this direct wilful statement, in ignorance of the truth, is the same as the statement of a known falsehood, and will constitute a scienter: *Hazard v. Irwin*, 18 Pick. 96; *Lobdell v. Baker*, 1 Metcalf, 193, S. C. 3 Id. 469; *Stone v. Denning*, 4 Id. 158; *Medley v. Watson*, 6 Id. 247; *Daniel v. Mitchell*, 1 Story, 172; *Dogget v. Emerson*, 3 Id. 700; *Mason v. Crosby*, 1 Wood. & Min. 342; *Tuthill v. Babcock*, Id. 298; *Hammett v. Emerson*, 27 Maine, 308; *Gough v. St. John*, 16 Wend. 646; *Thomas v. M'Cann*, 4 B. Monroe, 601; *Buford v. Caldwell*, 3 Missouri, 477; *Lockridge v. Foster*, 4 Scammon, 570; *M'Cormick v. Malin*, 5 Blackford, 509; *Joice v. Saylor*, 6 Gill & Johns. 54; *Munroe v. Pritchett*, 16 Alabama, 485.

Such a course of decision perfectly accords with the remark of Judge Story, that "the affirmation of what one *does not know or believe to be true*, is equally in morals and law as unjustifiable as the affirmation of what is known to be positively false;" while it is not at all inconsistent with the language quoted from *Ormrod v. Huth*, that "if the representation was honestly made, and *believed at the time to be true*, by the party making it, although not true in point of fact, it is not a fraudulent representation." The question of good faith is one, upon the evidence, for the jury: *Lord v. Colley*, 6 New Hamp. 99; *Bokee v. Walker*, 2 Harris, 139; and the plaintiff can recover, either by showing the positive statement and the defendant's knowledge of its falsity, or by showing the positive statement, and proving that the defendant had not and could not have had any knowledge in the matter. Either of these presents a case of moral fraud, and both of them are very different from that of a statement, false indeed in fact, yet honestly believed to be true.

It would seem, however, that even in the latter case, there is no principle of law which forbids a defendant being made liable, in an

We next come to that class of contracts which are void because infected with illegality, existing not by the rules of common law, but under the express provisions of some statute.

action on the case for *negligence*, which entirely meets the objection entertained by the English editor to the course adopted by the latest English decisions. Had the declaration in *Taylor v. Ashton*, *supra*, been framed with this view, the plaintiffs might, upon the verdict of the jury, have recovered. But, *volenti non fit injuria*, and if the purchaser knew the exact situation of the subject of the representation at the time it was made to him, he cannot, of course, recover damages on the ground of having been deceived by it.

Between the *allegatio falsi* and the *suppressio veri*, there is only this distinction, that the non-disclosure, in order to constitute fraud, must be of facts which the seller was under an obligation to disclose. 1 Story's Eq. § 207. Thus, where provisions are sold for home consumption, which are known by the seller to be unsound, he will be liable for a deceit, upon proof of his knowledge, independently of any representation made by him : *Van Bracklin v. Fonda*, 12 Johns. 468 ; *Emerson v. Brigham*, 10 Mass. 119 ; and it may be said in general, that any course of dealing calculated to create a false impression on the purchaser, will amount to a fraud : *Misner v. Granger*, 4 Gilman, 69 ; *Young v. Burnham*, 1 Freeman's Ch. 241 ; *Bean v. Herrick*, 3 Fairfield, 262 ; *Early v. Garrett*, 9 Barn. & Cress. 928 ; as where the seller should state facts which were true in themselves, but so expressed as to give the idea that they conveyed the whole truth, while a material fact is kept back. *Allen v. Addington*, 7 Wendell, 10, S. C. 11 Id. 75 ; *Kidney v. Stoddart*, 7 Metcalf, 252.

In Lord St. Leonards latest original work, "The Law of Property as Administered in the House of Lords," will be found collected the late important cases before that tribunal as to the rescission of executed contracts of real estate on the ground of fraud. These are also noticed, together with the American cases on the same subject, in Rawle on Covenants for Title, ch. xiii., while to the American annotations to *Chandelor v. Lopus*, 1 Smith's Lead. Cases, 211, and *Pasley v. Freeman*, 2 Id. 146, the student may be profitably referred upon the more immediate subject of which this note has attempted to treat.

The student will find the authorities upon the subject of contracts voidable in equity by reason of undue influence, in the notes to the case of *Huguenin v. Baseley*, 2 White & Tudor's Eq. Cases, 37-75. Those upon the subject of drunkenness are referred to *infra*.—R.

Now, with regard to this class, I need hardly say that no contract prohibited by the *express* provisions of a statute can be enforced in any Court of law: but it is necessary that you *should also bear in [*153] mind that an *implied* prohibition is equally fatal to its validity.

“Where a contract,” says Lord Tenterden in *Wetherell v. Jones*,^(l) “is *expressly* or by *implication* forbidden, no Court will lend its assistance to give it effect.” The examples which most commonly occur in practice of implied prohibition are in cases in which an act does not *in express terms* enact that a particular thing shall not be done, but imposes a penalty upon the person doing it. In such cases, the imposition of the penalty is invariably held to amount to an implied prohibition of the thing itself on the doing of which the penalty is to accrue. In *Bartlett v. Viner*,^(m) which is always referred to as a standard authority on this subject, Holt, C. J., says, “Every contract made for or about any matter or thing which is prohibited or made unlawful by statute is a void contract, though the statute does not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are no prohibitory words in the statute.”

[According to this principle, where a statute reciting the inconvenience which happens by watermen taking apprentices before they are housekeepers, enacted, that it should not be lawful for any waterman to take or keep any apprentice unless he should be the occupier of some house or *tenement, wherein to lodge [*154] the said apprentice and himself, and that he should keep such apprentice in the same house or

(l) 3 B. & Ad. 221, E. C. L. R. vol. 23.

(m) Carth. 252.

tenement wherein he himself should lodge, on pain of forfeiting 10*l.* for every offence, the Court of King's Bench decided that any contract to take an apprentice, entered into by such waterman not being an occupier of some house or tenement, as required by the Act, was prohibited; and consequently, that a pauper who had bound himself by indenture to serve such a waterman, unprovided with the required accommodation, and had served under it as apprentice, gained no settlement by such binding and service.⁽ⁿ⁾ For the same reason, a statute having required that with all coals delivered in London above a certain quantity, the seller should deliver a certain ticket, and in case of not delivering the ticket should, for every offence, forfeit a sum not exceeding 20*l.*, the seller of a quantity of coals, who had omitted to deliver a ticket with them to his customer, was held not to be entitled to sue him for the price.^(o) The statute 6 Ann. c. 16, requires all brokers within the City of London to be admitted by the Court of Mayor and Aldermen, and provides that if any one shall act as broker, not having been so admitted, he shall forfeit to the use of the Mayor, Aldermen, and Citizens 25*l.* for every offence. It has been decided, that a broker not so admitted [*155] cannot *recover his commission for work done by him as a broker.^(p) In the case of a pawnbroker, who had not made the entries required by the Pawnbroker's Act, it was held that he had not even a lien on the goods whereon he had advanced money, although the statute merely provided that this neglect should subject him to a penalty.^(q) And in a

(n) *King v. Inhab. Gravesend*, 3 B. & Ad. 340, E. C. L. R. vol. 23.

(o) *Cundell v. Dawson*, 4 C. B. 377, E. C. L. R. vol. 56.

(p) *Cope v. Rowlands*, 2 M. & W. 149.

(q) *Fergusson v. Norman*, 5 Bing. N. C. 76, E. C. L. R. vol. 35.

very recent case, an agreement between a licensed victualler, who kept a hotel, to let the cellar in his house, wherein another was to retail liquors without any license, was held void, although the statute requiring the license, merely enacted, that any person who should sell excisable liquor by retail without a license should forfeit from 5*l.* to 20*l.*(*r*) The cases decided upon this principle are very numerous, but these instances have been selected, because, while they illustrate the subject, they at the same time show how very many ordinary affairs are regulated by no other sanction than the imposition of a penalty, if they are not transacted in the manner prescribed by law.]¹

[Before leaving this subject, it will be convenient to advert to a distinction, in cases of this sort, between acts which are prohibited for the public advantage, and such as are prohibited for purposes of revenue; for it has been sometimes thought, that, in the latter class of instances, the only consequence *is to make the person committing such acts liable [*156] to the penalty, and not to make his contract unavailable.(*s*) But, as it is expressed by Parke, B., in *Cope v. Rowlands*, above cited, it may safely be laid down, notwithstanding some dicta apparently to the contrary, that, if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so had in view the protection of the revenue or any other object. The sole question is, whether the statute means to prohibit the contract.]

Now then, this being the general principle upon

(*r*) *Ritchie v. Smith*, 6 C. B. 462, E. C. L. R. vol. 60.

(*s*) *Forster v. Taylor*, 5 B. & Ad. 887, E. C. L. R. vol. 27.

¹ See *Buxton v. Hamblin*, 32 Maine, 448; *Boutwell v. Foster*, 24 Vermont, 485; *Beman v. Tugnot*, 5 Sandford, 153.

which all cases of statutable illegality depend, it is necessary that you should bear in mind a practical distinction which exists between this class of contract—contracts, I mean, forbidden by the *express* or *implied* enactment of some statute—and another class, in which the *contract* itself does not violate the statute but some *incidental illegality* occurs in carrying it into effect. In these latter cases the contract is good, and may be made the subject-matter of an action, notwithstanding the breach of the law which has occurred in carrying it into effect.

The best mode of explaining this is by an example. In *Wetherill v. Jones*,^(t) a rectifier of spirits brought an action against a confectioner to recover the price [*157] of spirits sold and delivered to *him. The defence relied upon was illegality. It appears that, under the Excise Acts, a rectifier or distiller when he sends out spirits, is bound to send with them a permit truly specifying their strength. The plaintiff had sent a permit, but it did not specify the true strength; and the defendant relied on this violation of the statute as an avoidance of the contract. But the Court held, that the illegality was not in the contract to sell the spirits, but in the subsequent act of removing them without a proper permit, and, therefore, that an action was maintainable upon the contract; and Lord Tenterden's judgment sets the distinction in a very clear light: "We are of opinion," said his Lordship, "that the irregularity of the permit though it arises from the plaintiff's own fault, and is a violation of the law by him, does not deprive him of the right of suing upon a contract which is *in itself* perfectly legal,^(u) there having been no agreement

(t) 3 B. & Ad. 221, E. C. L. R. vol. 23.

(u) It seems, that, by a subsequent statute, he would in this case be deprived of the right of suing. 2 Will. 4, c. 16, ss. 11, 12.

express or implied, in that contract, that the law should be violated by such improper delivery. Where a contract which a plaintiff seeks to enforce is expressly, or by implication, forbidden by the statute or common law, no Court will lend its assistance to give it effect; and there are numerous cases in the books in which an action on a contract has failed, because either the consideration for the promise or the act *to be done was illegal, as being against [*158] the express provisions of the law, or contrary to justice, morality, and sound policy. But where the consideration and the matter to be performed are both legal, we are not aware that a plaintiff has ever been precluded from recovering by an infringement of the law not contemplated by the contract in the performance of something to be done on his part.”

[Thus also, in a more recent case, where the vendor of goods sold abroad knew that it was the purchaser's intention to smuggle them into this country, but rendered no aid to him in his unlawful act, the commission of that act, with such knowledge on the vendor's part, did not prevent his recovering the price.(x) Although if he had been a party concerned in breaking the revenue laws, as if, in pursuance of his contract, he had so packed the goods as to assist the purchaser in smuggling them, he could not have recovered the price.(y)]¹

(x) *Pellecat v. Angell*, 2 Cr. M. & R. 311.

(y) *Waymell v. Reed*, 5 T. R. 599.

¹ The mere knowledge on the part of the lender, that the borrower of the legal currency of another State intended to use it in the State of New York, where its circulation was prohibited, would not so far vitiate a contract made in the State where it would be valid, as to authorize the courts of the latter State to refuse to enforce it. *Merchants' Bank v. Spalding*, 12 Barbour, 302. A. not owning any Canton stock, employed B., a broker, who owned some, to sell for him

With regard to the distinction of which I have been speaking, I will make but one further observation, namely, that it would apply to cases of common law as well as statutable illegality; but I have spoken of it under the head of statutable illegality, because I do not remember any decided case arising upon a question [*159] as to illegality at *common law which would aptly illustrate it. I can, however, put such a case without difficulty. Suppose, for instance, *A.* employs *B.*, a builder, to repair the front of his house, and *B.*, in so doing, erects an indictable nuisance in the public street, still, as the contract to repair the house is legal, and the erection of the nuisance in so doing was not contemplated by the agreement, *B.* might recover for the repairs which he had executed. But it would be otherwise if it had been made part of the agreement, that the repairs should be performed by means of the erection of the nuisance; for there, the illegality would have entered into and formed part of the contract.¹

two hundred shares at sixty-six dollars a share, deliverable at *A.*'s option, at any time within thirty days, and deposited with *B.* \$750 to protect him against loss. The broker contracted to sell at that rate, and notified *A.*, and within the term limited, bought and delivered stock in execution of the contract. Held that the money was advanced to be used for an illegal purpose, and could not be recovered back. *Staples v. Gould*, 5 Sanford, 411.

¹ The cases upon this subject seem to require a somewhat fuller notice. In *Rex v. Somerby*, cited by the lecturer, a pauper apprentice was moved, by reason of illness, from the parish of Melton Mowbray, to that of Somerby, where he resided forty days, during which time he was employed in selling lottery tickets, and it was held that he had gained a settlement in the latter parish, notwithstanding the unlawful act in which he had been engaged; though it was suggested that if the master and apprentice had conspired together, and moved thither for that purpose, the case might have been different; and this decision is perfectly reconcilable with principle and with all the au-

Now, such being the effect of illegality created by statute, in avoiding an agreement tainted with it, and

thorities. But in *Pellecat v. Angell* it was held that a foreigner selling and delivering goods to a British subject could recover their price, although he knew at the time of sale that the buyer intended to smuggle them into England, and the decision (which was in accordance with the previous case of *Hodgson v. Temple*, 5 Taunton, 181, except that that case went farther, both parties being English), to some extent, was rested on the distinction taken in *Biggs v. Lawrence*, 3 Term, 454, between merely knowing of the illegal act, and being a party thereto. That case decided that where a smuggler bought brandy in Guernsey, and the vendor packed it in ankers in preparation for smuggling, he could not recover the price of it, because he was aiding in the breach of the revenue laws, while in *Holman v. Johnson*, Cowper, 342, where the vendor, a foreigner, knew of, but did not actively participate in the smuggling, he was held entitled to recover. Lord Abinger, however, in delivering the opinion in *Pellecat v. Angell*, did not rely wholly on this distinction between mere knowledge and participation, but to a great extent based his opinion upon the fact of the law which was infringed, being a foreign one to the plaintiff. "It is perfectly clear," said he, "that where parties enter into a contract to contravene the laws of their own country, such a contract is void; but it is equally clear, from a long series of cases, that the subject of a foreign country is not bound to pay allegiance or respect to the revenue laws of this, except indeed that when he comes within the act of breaking them himself, he cannot recover here the fruits of that illegal act. But there is nothing illegal in merely knowing that the goods he sells are to be disposed of in contravention of the fiscal laws of another country." Such a course of reasoning has been, however, seriously questioned by Mr. Justice Story in his treatise on the Conflict of Laws (§ 254, note), who asks, if a Frenchman could be allowed to recover, in England, the price of poison sold in France for the avowed purpose of poisoning the Queen. But it may be remarked of the English cases that for some time, and until a very recent period, contracts connected with a violation of the *revenue* laws, were rather less severely construed, than those in violation of other statutory provisions (see some of the cases, *supra*, note to page *14), and *Pellecat v. Angell*, which was decided in 1835, may, so far as concerns the above reasons, for the decision, be classed with these cases.

But upon the other ground, the line of distinction between know-

such being the distinction between illegality stipulated for,—contemplated by the contract,—and illegality

ledge and participation, or rather between what is and what is not participation, is at times a difficult one, and it is certain that the older cases have sanctioned recoveries in instances where they would now perhaps be denied. Thus, in *Faikney v. Reynous*, 4 Burrow, 2069, the plaintiff and one Richardson were jointly concerned in a transaction forbidden by the act “to prevent the infamous practice of stockjobbing” (7 Geo. 2, c. 8), and the plaintiff having paid the whole of the loss sustained by the failure of the operation, the Court (Lord Mansfield, Ch. J.) held that a suit could be maintained upon a bond given to the plaintiff by the defendants to secure the repayment of Richardson’s proportion of the loss, as the illegality did not enter into this new transaction; and in the subsequent case of *Petrie v. Hannay*, 3 Term, 418, the facts and the decision were the same way. So, it was formerly held that money lent to pay a gambling debt might be recovered, though the money lost could not: *Robinson v. Bland*, Burrow, 1077; *Barjeau v. Walmsley*, Strange, 1249; *Alcinbrook v. Hall*, 2 Wilson, 300; and these cases were approved in *Farmer v. Russell*, 1 Bos. & Pull. 299, though the decision in that case was on a different ground, viz., that one who had received money for the use of a party engaged in an illegal contract could not defend in an action for money had and received on the ground of illegality, he being considered in the light of a stakeholder (as to which see *infra*). But this class of cases soon followed, in which the authority of *Faikney v. Reynous*, and *Petrie v. Hannay*, was sometimes distinguished, but more frequently questioned: *Booth v. Hodgson*, 6 Term, 405; *Lightfoot v. Tennant*, 1 Bos. & Pull. 551 (where Eyre, Ch. J., put the case of a druggist who should sell arsenic to one who he knew was going to poison his wife with it); *Aubert v. Maze*, Id. 371, Eldon, Ch. J.; *Langton v. Hughes*, 1 Maule & Selw. 593 (where it was held that one who sold drugs to a brewer, knowing that he would use them to adulterate ale with, contrary to a statute, could not recover, though it was not proved that they had been so used); *Webb v. Brook*, 3 Taunton, 12; *Ex parte Mather*, 3 Vesey, 373; *Ex parte Daniel*, 14 Id. 192; *Gas Light Co. v. Turner*, 6 Bing. N. C.; and in *Cannan v. Brice*, 3 Barn. & Ald. 179, two partners entered into an illegal stockjobbing transaction, by which a heavy loss was sustained, which was paid by a sum of money lent them by Bryce, the defendant, who, as the jury found, was not a partner in the stockjobbing transaction. I

occurring incidentally during the course of its performance, I will proceed, as I did when speaking of ille-

consideration of this loan, which had been only secured by a bond, one of the partners assigned to the defendant three cargoes of vessels, and soon after, a commission of bankruptcy issued against both of them, and the assignees in bankruptcy were held entitled to recover the proceeds of these cargoes from the defendant. "If," said Abbott, Ch. J., who delivered the opinion of the Court, "the defendant acted unlawfully in lending his money to the bankrupts, he could not have sued them for recovery of payment, because no suit can be maintained upon an unlawful act; and if recovery could not be enforced at law upon the contract of lending, neither could recovery be enforced upon a bond given for the performance of that contract;" nor, consequently, upon the assignments which were to secure the bond; and in *M'Kinneil v. Robinson*, 3 Mees. & Wells. 435, this case was approved, and it was held, in opposition to *Alcinbrook v. Hall*, that money lent to play hazard with could not be recovered back.

On this side of the Atlantic, the authority of the older and over-ruled English cases has, however, been in many instances recognized and affirmed. Thus in *Carson v. Rambert*, 2 Bay, 360, it was held (on the authority of *Robinson v. Bland*), that the value of a horse lent to stake at a gaming table could be recovered by the lender, from the borrower. But the principal case is perhaps *Armstrong v. Toler*, 2 Wash. C. C. R., and 11 Wheaton, 258, where Armstrong and others contrived, during the war, a plan to smuggle into the country goods consigned to Toler, and on their seizure at the port of destination, Toler became security to the government to abide the event of the suit, and delivered to Armstrong his proportion of the goods on his promise of repayment, in case they should eventually be condemned. The goods were condemned, and Toler paid the amount of their appraised value, and in suit brought by him against Armstrong, it was objected that the contract was void, as founded on an illegal consideration; but the court below charged that the subsequent independent contract, founded on a new consideration (*viz.*, that of the delivery of the goods to Armstrong), was not contaminated by the illegal importation, although it was known to Toler when the contract was made, *provided* the latter had no interest and participation in the importation, and this was left as a fact to the jury, who found that he had no such participation, and the judgment entered on the verdict was affirmed on error, upon the authority of *Faikney v. Reynous*, and *Petrie v. Hannay*; and to the

gality at common law, to specify some of the instances of most ordinary practical occurrence, in which the

same effect are *Smith v. Barstow*, 2 Dougl. (Mich.) 163; *Leavitt v. Blatchford*, 5 Barb. S. C. Rep. 9; *Hook v. Gray*, 6 Id. 398; *Thoma v. Brady*, 10 Barr, 169; *Phalen v. Clark*, 19 Connect. 432 (some of which cases also recognized as authority those of *Falkney v. Reynous* and *Petrie v. Hannay*); and in *Cheney v. Duke*, 10 Gill & Johns. 11 it was thought by the court to be abundantly settled that the knowledge of the vendor that the subject of the sale was to be illegally employed, could not defeat his recovery of the contract price; and in an action brought for the purchase-money of a slave, bought for the purpose of exportation contrary to a local statute, the plaintiff was, notwithstanding his knowledge of the unlawful exportation was proved, held entitled to recover, on the ground that nothing was done by him in furtherance of the illegal design.

In *M'Intyre v. Parks*, 3 Metcalf, 208, a mortgagee was, on the authority of *Holman v. Johnson*, supra, held entitled to recovery, though the consideration of the mortgage was lottery tickets, whose sale was prohibited in Massachusetts, on the ground that the contract was made in New York, where such sales are valid, and notwithstanding the mortgagee knew that they were intended to be sold in the former State, in violation of its laws; while in *Scott v. Duffy*, 2 Harris, 18, money lent in New Jersey to be bet upon the presidential election, was allowed to be recovered in Pennsylvania, on the ground that there was no evidence that such a bet was illegal in New Jersey. In *Steele v. Curle*, 4 Dana, 387, the following remarks were made upon this subject by Robertson, Ch. J., after referring to the different opinions which have been expressed:—

“We feel that it may be but proper to suggest, in passing, that we would be inclined neither to concur with, or to dissent from, the doctrine of either party, *in extenso* and *altogether*, without limitations or qualification; but should rather incline to the conclusion that, although, as we are disposed to think, a simple knowledge, by a vendor, of the fact that the vendee buys an article for the purpose or with an intention of using it in violation of a public law, or a principle of moral rectitude, may, in strong and flagrant cases, such as that supposed by Chief Justice Eyre, be a sufficient reason for withholding, from either party, the aid of the law for enforcing the contract, yet there may be cases of a lighter shade or less degree of enormity, in which the same fact might not, alone, be entitled to the same effect: and in the latter

legislature has, by express provision, rendered particular contracts illegal.

[And *first*, although a contract cannot hereafter become void upon the ground of *usury* ; yet the change from a very different state of law is so important and

class, we would be inclined to place the beer case decided by Lord Ellenborough. And the reason why we should be disposed to make any discrimination in consequence of the color or degree of the transgression contemplated by the buyer and merely understood by the seller, and why, also, we are inclined to agree with Chief Justice Eyre to some extent, is just because it does seem to us, that no one can sell a commodity, knowing that the buyer intends to use it for any purpose so flagitious as that of murder or treason, or other flagrant violation of the fundamental rights of man or of society, without betraying such a degree of turpitude and recklessness as to implicate him, as a voluntary and active participant in the unlawful design, and, as therefore, *quantum in illo*, willing and instigating a crime, which it is the civil duty of every citizen to oppose ; and that the like knowledge alone, of the buyer's purpose of unlawful appropriation or use, would not necessarily lead to the like deduction, as to the motive or conduct of the seller, in every case of inferior degree,—as the beer case ; the case of a purchase of an article with the intention of again making a fraudulent sale or use of it ; the case of a loan of money to a person who borrows for the purpose of re-lending to a stranger at illegal interest ; the case of a sale of merchandise by a wholesale merchant, in the regular course of his business, to one who, when he buys, intends to smuggle it into a foreign port, without paying the legal and accustomed duties ; and many other cases of a similar kind, in which a citizen may be neutral without being guilty of incivism, or of any intentional participation in the unlawful design. In all such cases, it would seem to us, that in a commercial, busy, and enterprising age, the law should not attempt to establish a morality so pure, and exact, and vigilant, as that which would make it the legal duty of every seller of every vendible thing, to become a casuist or censor, so far as to make him responsible for the known motives of the buyer, and an active and guilty co-operator with him in his contemplated violation of law, of principle, or of justice."

The later English cases were, however, cited with approbation, and followed in *Perkins v. Savage*, 18 Wendell, 418 ; *Branch Bank v. Crocheron*, 5 Alab. 256 ; *Wooten v. Miller*, 7 Smedes & Marsh. 386, and *Duncan v. Cox*, 6 Blackford, 270.

so recent, and so many things will for a number of years often come before you, which *have been [*160] and are still affected by the usury laws,] that it is necessary to give you a short history of the modern enactments on that subject.

From the reign of Queen Anne down to that of William the Fourth the important statute on this subject was 12 Anne, st. 2, c. 16, which enacted, that no persons should take, either directly or indirectly, interest at more than 5 per cent., and that all contracts to the contrary should be void. In construing this statute, it was always held that no contract, however framed, however unlike a contract for a loan or for interest it might apparently be, would hold good if the ultimate effect of it would be to secure more than 5 per cent. interest for the loan of money. Every conceivable means was used to evade the statute. Sometimes a transfer of stock, sometimes commission on a discount, sometimes a substitution of one contract for another, or several concurrent contracts were resorted to; but the effort of the Court was in every case to strip off the external covering of form, and get at the intent and real import of the transaction, and if that were tainted with usury, the contract was held void. (z)

Now, such being the law as constituted by the statute of Anne, the first relaxation was by stat. 3 & 4 W [*161] 4, c. 98; that was the Act renewing the *charter of the Bank of England; and it enacted, among other things in sect. 7, that bills of exchange and promissory notes, payable at or within three months after

(z) See *Wright v. Wright*, 3 B. & C. 273, E. C. L. R. vol. 10; *Chippindale v. Thurston*, E. C. L. R. vol. 19, p. 425; *Meagoe v. Simmons*, M. & M. 121, E. C. L. R. vol. 22; *Carstairs v. Stein*, 4 M. & Sel. 192; *Belcher v. Vardon*, 14 L. J. (C. C.) 427.

date, or not having more than three months to run, should be exempted from the usury laws. And I suppose that this enactment was found beneficial, for, by a subsequent Act of 1 Vict. c. 80, the three months were extended to twelve months. And by a still later Act of 2 & 3 Vict. c. 37, it was enacted, "That no bill or note not having more than twelve months to run, nor any contract for the loan or forbearance of more than 10*l.* sterling, shall be void by reason of the usury laws; provided that the Act shall not extend to the loan or forbearance of money on the security of any lands, tenements, or hereditaments, or any estate or interest therein." This Act was only to continue in force till January 1, 1842; [but it was continued by several other Acts, the last of which was 13 & 14 Vict. c. 56, to 1st January, 1856.]

Now you will observe that none of these Acts repeal the statute of Anne. They only exempt from its operation the cases provided for by 2 & 3 Vict. c. 37. And that statute does not apply to loans of money *under* 10*l.*, nor to cases of *loans on the security of real property*. Mortgages, for instance, remained still governed by the statute of Anne, and void if more than 5 per cent. were directly or indirectly reserved by way of interest. You will now see why I thought it proper to cite *cases on the construction of the statute of Anne. If you [*162] wish to inquire further regarding that Act, see notes to *Ferrall v. Shaen.*(a)

[At length the general Act of 17 & 18 Vict. c. 90, has repealed "all existing laws against usury," provided that nothing therein contained shall prejudice or affect the rights or remedies of any person, or diminish or alter the liabilities of any person, in respect of any

(a) 1 Wms. Saund. 294.

act done previously to the passing of the Act. It also provides, that, where at the time of passing the Act interest was payable upon any contract for payment of the *legal* or *current* rate of interest,—where interest was by any rule of law then payable upon any debt or sum of money, the same rate of interest shall be recoverable as if the Act had not passed; but this not to affect the law as to pawnbrokers.]

The next example to which I shall advert arises on the Acts against Gaming. These are exceedingly complex and troublesome; but it is absolutely necessary to direct your attention to them, for questions upon them are continually occurring in practice.

The first Act is that of 16 Car. 2, c. 7, s. 3, which enacts, that if any one shall play at any pastime or game, by gaming or betting upon those who game, and shall lose more than the sum of 100*l.* on credit, he shall not be bound to pay, and any contract to do so shall be void.

[*163] *The 9th Anne, c. 14 (the principal enactment), provides, in sect. 1, that all securities for money or any other valuable thing won by gaming or playing at cards, dice-tables, bowls, or other game whatever, or by betting on those who game, or for money lent for such gaming or betting, or lent to gamesters at the place where they are playing, shall be void.

And the 2d section enacts, that any person who shall at a sitting lose the sum or value of 10*l.* may recover it back again within three months; and if he do not, any other person may, together with treble the value, half for himself, and half for the poor of the parish.

Now you will observe, that, under these two Acts, securities for money lost at gaming, or by betting on

gamesters, or for money lent to them to game with, are illegal.

And you will further observe, that, even if no security be given, but the loser pay in cash, still, if the sum lost amount to 10*l.*, it may be recovered back again. (b)

Now a *horse-race* is a *game* within the meaning of these Acts of Parliament, as you will find laid down in several cases: (c) and, therefore, *if the law [*164] rested upon these statutes, all losses above 10*l.* on any such race would be recoverable back by the loser, and would put the winner in danger of the penalties of the statute of Anne, and securities for the payment of any such losses would be *void*. But it was thought that horse-racing, confined within due limits, had a tendency to improve the breed of horses, and thereby promote the interests of the country at large: Acts of Parliament have therefore been passed, providing for this particular object, and excepting such races, to a certain extent, from the provisions of the Gaming Acts. This was first done by stat. 13 Geo. 2, c. 19, which legalized matches run at Newmarket, at Black Hambleton, or for the sum of 50*l.* and upwards. But this statute imposed certain restrictions as to the weights which the horses were to carry, which it seemed expedient to repeal; and for that purpose was passed 18 Geo. 2, c. 34, s. 11, which, after reciting the restriction of the former statute as to weights, enacts that it shall be lawful for any person to run any match, or to start and run for any plate, prize, sum of money,

(b) You may consult, on the construction of these Acts, *Sigel v. Jebb*, 3 Stark. 1, E. C. L. R. vol. 3; *Brogden v. Marriott*, 3 Bing. N. C. 88, E. C. L. R. vol. 32; and *M'Kennill v. Robinson*, 3 M. & W. 134.

(c) *Goodburn v. Marley*, Str. 1159; *Blaxton v. Pye*, 2 Wils. 309; and *Brogden v. Marriott*, 3 Bing. N. C. 88, E. C. L. R. vol. 32.

or other thing of the value of fifty pounds or upwards, at any weights whatever, in the same manner as if the Act of the 13th of Geo. 2 had never been made.

This Act, you will at once see, was made merely to take away the restrictions with regard to weight which [*165] had been imposed by the 13th of Geo. 2; *but though that was its object, by one of those strange accidents which are so common in the history of law, the legality of all horse-racing has come to depend upon it.

In the 1st section of the 13th of Geo. 2, there was a very strange and unaccountable enactment. It enacted that no person should start more than one horse for the same plate; and that, if he did, all the horses entered by him, except the first, should be forfeited, and recovered by information or action at the suit of a common informer. The law regarding racing, mixed up as it is with the other Gaming Acts, being extremely complex, this portion of it was probably forgotten, and certainly was not universally acted upon, when suddenly, in the years 1839 and 1840, informations were filed for the purpose of recovering several valuable race-horses, which had been entered by their owners, along with other horses their property, for the same stakes, in total ignorance of the prohibition of the Act of Parliament.

As soon as this was represented to the Legislature, it interfered for the protection of the defendants, and passed the 3 Vict. c. 5; but that Act, I presume, inadvertently, instead of repealing so much of the 13 Geo. 2 as inflicted penalties, repealed that Act altogether *so far as it related to horse-races*.

Now it had always been supposed that the legality [*166] of horse-races depended on the 13 Geo. 2, and *that the 18th of the same reign was a sub-

sidiary Act, and had merely the effect of taking off restrictions as to weight. And many persons therefore thought that the Act of 3 Vict. c. 5, instead of effecting the object of the Legislature by protecting horse-races, had repealed the only enactment by which they were supported, so that they had been thrown back into the class of games comprised within the statute of Anne, and would be illegal if for a larger stake than 10*l*. At length the question arose, and was argued in a case of *Evans v. Pratt*,^(d) in which the Court of Common Pleas decided, that the words of the 11th sect. of the 18 Geo. 2, c. 34, were large enough to legalise all horse-races for stakes of 50*l*. and upwards. The judgment of Maule, J., gives the law on races as it now stands:—"I think the 11th section of the 18 Geo. 2, c. 34 is to be read thus:—'It shall be lawful for any person to run any match for 50*l*. or upwards, at any weights, whatsoever, and at any place whatsoever, without incurring the penalties in the Act of 13 Geo. 2, c. 19, and without incurring any other illegality under any previous statute.' If that be the true construction of this section, the repeal of the 13 Geo. 2, c. 19 will not have the effect of taking away the legality of any race which was legal before the passing of the repealing statute. Then the only question is, whether *the 11th section of the 18 Geo. 2, c. 34 extends to this case. As [*167] that statute is one which takes away penalties, it ought to be largely expounded. The object of the Legislature throughout these enactments has been to encourage the production of a strong and powerful breed of horses; and I think this was a race calculated to further that object. The only doubt is raised by the language held by Lord Eldon, C. J., in *Whaley v.*

Pajot.(e) The decision in that case merely goes to this, that a race of two horses against one is not a horse-race within the meaning of the statutes. Lord Eldon is reported to have said, 'that there seems to be much ground for arguing from the nature of the 16 Car. 2 and 9 Anne, that these Acts ought to be construed strictly, in order to enforce the principle on which they are founded, namely, to prohibit all horse-racing, and that the 13 Geo. 2 and 18 Geo. 2 are, from their nature, to be so construed as to encourage the breed of horses, *and to permit that species of horse-racing only called racing on the turf.*' Lord Eldon does not say, to permit only 'races on the turf,' but 'that species of racing.' I see nothing, however, in the Acts to require so narrow a construction; and I think it is not too much to say, that the statutes extend to all races between two horses running at the same [*168] time from one point to *another point. It cannot be doubted that such races were assumed to be legal when the statute of 3 & 4 Vict. c. 5 passed." Such races are therefore legal, and it is settled(f) that a race for 25*l.* is a race for 50*l.*

These statutes and cases were reviewed at great length in the case of Applegarth v. Colley,(g) which decides that a horse-race for a sweepstakes of 2*l.* each is not illegal, although the total amount subscribed and run for amounted to less than 50*l.*, inasmuch as neither the statute of Charles (it being a ready money payment) nor the statute of Anne apply to a "race for a sum of money not raised by the parties themselves (that being, in truth, a wager), but given by way of prize by a third person desirous of encouraging racing."

(e) 2 B. & P. 51.

(f) Bidmead v. Gale, 4 Burr. 2432.

(g) 10 M. & W. 723.

The case of *Bentinck v. Connop*,^(h) shows that all races are illegal under the statute of Charles, where the stake exceeds 100*l.* and is not paid down, and it upholds the view that the legality of racing depends on the 18 Geo. 2, c. 34. *Daintree v. Hutchinson*,⁽ⁱ⁾ decides that a dog-race is within the statute of Charles.

The stake is the aggregate of the sums subscribed.^(k)

But though a race for 50*l.* is thus legalised, a *bet on such a race is not so, for it has been [*169] decided^(l) that a person betting, even on a legal horse-race, is in the same situation as if he had betted upon any other game.

Now there is one point not perhaps precisely forming part of, but strongly bearing on this subject, and of which I must here warn you. When I speak of the statutes of Charles and Anne as rendering bets of a greater amount than 10*l.* recoverable back from the winner, and rendering all securities for bets void, you must understand me to speak of bets on persons gaming; for the words of the former statute are, "by playing at the games or betting on the players," and of the latter and more important one, "betting on the sides of such as game at any of the aforesaid games." All wagers, therefore, are not affected by these statutes, but only wagers upon *games*. Now a *foot-race* is a *game* within these Acts.^(m) So are *cards*, *dice*, *tennis*, *bowls*, for they are mentioned in the Acts; and so is *cricket*, though not specified;⁽ⁿ⁾ not that there is any-

(h) 5 Q. B. 693, E. C. L. R. vol. 48.

(i) 10 M. & W. 85.

(k) *Challand v. Bray*, 1 Dowl. N. S. 783.

(l) *Shilleto v. Theed*, 7 Bing. 403, E. C. L. R. vol. 20.

(m) *Lynall v. Longbotham*, 2 Wils. 36.

(n) *Hodson v. Terrill*, 3 Tyr. 929.

thing illegal in these amusements themselves, but that the law will not allow the winner of 10*l.* or upwards to receive or retain his winnings, nor will it allow any security for any winnings at them to be enforced. But as to wagers not made upon *games* within the meaning [*170] of these *Acts of Parliament, if there be nothing illegal or opposed to public policy in the subject-matter of the wager, it has been held that there was no statute which affects its validity. This was decided in the famous case of *Goode v. Elliott*,^(o) in which the wager, whether a particular person had, before a particular day, bought a wagon, was held legal, and the winner allowed to recover against the loser, in an action, by three Judges contrary to the opinion of Mr. J. Buller, who advocated the view which probably would have been most consistent with sound policy, namely, that the Courts should refuse to occupy their own time and that of the public by trying such questions. However, the decision in *Goode v. Elliott* has been supported;^(p) and indeed the point is so well recognized, that all issues sent from the Court of Chancery to be tried at law, are, in the absence of special directions to the contrary, framed as upon wagers; and in *Evans v. Jones*,^(q) one of the learned Barons says: "It is too late now to say that no wager can be enforced at law, though I think it would have been better if they had been originally left to the decision of the jockey club." In that particular case the wager was held invalid, on the ground that, under the particular circumstances, its tendency was to obstruct [*171] the course of public justice, which *is an objection sufficient, as I have already explained

(o) 3 T. R. 693.

(p) *Hussey v. Crickett*, 3 Camp. 168; and *Jones v. Randall*, Cowp. 37.

(q) 5 M. & W. 82.

in the commencement of the lecture, to invalidate a contract at common law.¹ Much alteration has, how-

¹ By the common law, wagers were valid : *Goode v. Elliott*, and cases cited *supra* ; *Campbell v. Richardson*, 10 Johnson, 206 ; *Haskett v. Wooton*, 1 Nott & M'Cord. 180 ; *Clark v. Gibson*, 12 New Hamp. 386 ; *Ball v. Gilbert*, 12 Metcalf, 397 ; *Scott v. Duffy*, 2 Harris (Pa.) 18 ; except so far as contrary, 1. To public policy, or 2. To private characters or feelings. The former ground renders invalid all wagers on the result of an election : *Allen v. Hearn*, 1 Term, 56 ; *Ball v. Gilbert*, *supra* ; *Rust v. Gott*, 9 Cowen, 169 ; *Wheeler v. Spencer*, 13, Connecticut, 28 ; *Lloyd v. Leisening*, 7 Watts, 294 ; *Wagonseller v. Snyder*, Id. 343 ; *Wroth v. Johnson*, 4 Har. & M'Hen. 284 ; *Gardner v. Nolen*, 3 Harrington, 420 ; *Laval v. Myers*, 1 Bailey, 486 ; *Duncan v. Cox*, 6 Blackford, 270 ; on the acquittal or discharge of a prisoner : *Evans v. Jones*, 6 Mees. & Wels. 77 ; on the result of a prize fight : *Hunt v. Bell*, 1 Bing. 1, 8 E. C. L. R. ; *M'Keon v. Caherty*, 1 Hall, 300 ; in restraint of marriage : *Hartley v. Price*, 10 East, 22, and the like. The second ground renders invalid, wagers as to whether an unmarried woman would have a child by a certain day : *Ditchurn v. Goldsmith*, 4 Camp. 132 ; as to the sex of a third person : *De Costa v. Jones*, Cowper, 729 (which was the well-known case as to the sex of the Chevalier D'Eon) ; as to the life of a human being : *Philips v. Jones*, 1 Rawle, 37 ; and perhaps as to the solvency of a third person : *Thornton v. Thackray*, 2 Younge & Jerv. 156.

But as actions on wagers of any kind were never favored by the courts, they have at times gone so far as to hold all wagers to be invalid : *Lewis v. Littlefield*, 15 Maine, 233 ; *Collamer v. Day*, 2 Vermont, 144 ; *Edgill v. M'Laughlin*, 6 Wharton, 179 ; *Thomas v. Cronise*, 16 Ohio, 54 ; *Hart v. Hart*, 6 N. Hamp. 104 ; *Rue v. Gist*, 1 Strobhart, 82 ; and in many of the States statutory provisions exist, forbidding wagering or gaming contracts, to a greater or less extent : *Wheeler v. Spencer*, 15 Connect. 28 ; *Fowler v. Van Surdam*, 1 Denio, 537 ; *Fairis v. Kirtley*, 5 Dana, 460.

Where a wager is invalid from any of the above causes, so long as the money remains in the hands of the stakeholder, it is considered as being still within the control of the parties, and the loser may maintain an action to recover his stake : *M'Allister v. Hoffman*, 16 Serg. & Rawle, 148 ; *M'Allister v. Gallagher*, 3 Penn. 464 ; *Tarleton v. Baker*, 18 Vermont, 9 ; although if the money have been actually and bona fide paid over by the stakeholder to the winner, no part of it can be

ever, since taken place, which it is hoped may be made plain by a few arguments.

[It is clear, that, at common law, contracts by way of gaming or wagering were not, as such, unlawful. Their illegality depends upon statute law, and after numerous recent alterations, it does not seem, that, in the many statutes on the subject of gaming, any enactment remains, except 6 Will. 4, c. 41, s. 1, hereafter mentioned, whereby they are rendered *illegal*. This however, is by no means clear, but the state of the law is probably as follows: in 8 & 9 Vict. c. 109, s. 18, i

recovered from the latter by the loser, for the case then comes within the maxim, *in pari delicto potior est conditio defendentis*: M'Allister v. Hoffman, *supra*; Speise v. M'Coy, 6 Watts & Serg. 485; Danforth v. Evans, 16 Vermont, 538; Machin v. Moore, 2 Grattan, 257; M'Hatton v. Bates, 4 Blackford, 63; Thomas v. Crorise, 16 Ohio, 54; but if the stakeholder should pay over the money to the winner, after notice from the loser not to do so, he would pay at his own risk, and being in the position of a mere agent whose authority has been revoked he would be liable to the loser for the amount of his stake: Wheeler v. Spencer, *supra*; Ivey v. Phifer, 11 Alab. 335; Stacey v. Foss, 1 App. 335; Perkins v. Hyde, 6 Yerger, 238. The law was so held in New York in Vischer v. Yates, 11 Johnson, 23; but that decision was overruled by Yates v. Foot, 12 Id. 1; and although the Revised Statutes give a remedy against a stakeholder who pays over to the winner after notice from the loser, yet the courts apply the rule of Yates v. Foot, in cases not brought exactly within the statute as to form, time, &c.; Brush v. Keeler, 5 Wend. 250; Fowler v. Van Surdam, 1 Denio, 557.

The student will find most of these, as well as many other authorities upon the subject of wagers and of wagering policies, in the note to Godsall v. Boldero, 2 Smith's Lead. Cas. 250.—r.

A bet on an election is void at common law: Like v. Thompson, 6 Barbour Sup. Ct. Rep. 315; see also Bettis v. Reynolds, 12 Iredell 344; Terrall v. Adams, 23 Mississippi, 570; Bates v. Lancaster, 10 Humphreys, 134; Bevil v. Hix, 12 B. Monroe, 140.

As to wagers generally see Smith v. Brown, 3 Texas, 360; Humphreys v. Magee, 13 Missouri, 435; M'Elroy v. Carmichael, 6 Texas 454; Parsons v. The State, 2 Carter, 499.

is enacted, that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be *null and void*; and that no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made, provided always that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise.

[It seems to follow that a bill or note given by *the loser to the winner, for money won by [*172] gaming, is given without consideration, and cannot be recovered by the latter; but it is clear, that, by force of 6 Will. 4, c. 41, s. 1, such securities are still to be treated as given upon an *illegal* consideration, and therefore the statute 9 Ann. c. 14, s. 1, will still have an operation.^(r) And although money deposited with a stakeholder to abide the event of any wager cannot be recovered by the winner, yet there is nothing to prevent such a depositor, who repents of his venture and repudiates the wager before the happening of the event, from recovering from the stakeholder the money deposited by him.^(s) Within the proviso with which the before-mentioned enactment concludes, it has been held that a foot-race is included; and that where two agreed to run such a race, and each deposited 10*l.* with a third person, the whole to be paid to the winner, the loser could not recover back his 10*l.* from the stakeholder, the transaction being legal.^(t)]

(*r*) See post, p. 201.

(*s*) *Varney v. Hicknan*, 5 C. B. 271, E. C. L. R. vol. 57.

(*t*) *Batty v. Marriott*, 5 C. B. 818, E. C. L. R. vol. 57.

There is, however, one class of *wagers* which require some attention. I allude to wagers in the shape of policies of insurance. An insurance, as you doubtless are aware, is a contract by which, in consideration of [*173] premium, one or more person or persons assure another person or persons in a *certain amount against the happening of a particular event; for instance, the death of an individual, the loss of a ship, or the destruction of property by fire. These three classes of policies, upon *ships*, *lives*, and *fire*, are the most common of occurrence; but there is nothing to prevent insurance against other events; for instance, in *Carter v. Boehm*,^(u) one of the most celebrated cases in the Reports, Lord Mansfield and the rest of the then Court of King's Bench supported a policy of insurance against foreign capture effected in a fortress. Now, this contract of insurance, though one of the most beneficial known to the law, since it enables parties to provide against events which no human skill can control, to provide, for instance, against the ruin of a family by the sudden death of a parent, the ruin of a merchant by the loss of his venture at sea, or of a manufacturer by the outbreak of a fire on his premises, though productive, therefore, of most beneficial consequences to society, yet is very liable to be abused and made an engine of mere gambling; for instance *A.* insures *B.*'s life; *i. e.* he pays so much a year, or so much in the lump, to some one who is to pay him so much upon *B.*'s death. If *B.* owes him money, and his object is to secure himself, it is a *bona fide* insurance; but if *B.* is a mere stranger, in whose life he [*174] has no interest, it is a mere wager. In order *to prevent the contract of insurance from being thus abused, the statute 14 Geo. 3, c. 48, pr

(u) 3 Burr. 1905.

hibiting wager policies, as they are called, altogether, prevents a man from insuring an event in which he has no interest, and, where he has an interest, but not to the extent insured, prohibits him from recovering more than the amount of his interest. The effect of this Act, in a word, is to invalidate wagers framed in the shape of policies of insurance, thus(*v*) a wager on the price of Brazilian shares framed like a policy was held invalid. [But where the transaction would not be commonly understood to be a policy of insurance, and therefore would not fall within the words of the stat. 14 Geo. 3, c. 48, taken in their ordinary acceptance, the Courts would probably not consider it as within this Act.(*x*)]

This Act applies to all subjects of insurance except marine risk, and these are provided for by the insertion of a similar prohibition contained in 19 Geo. 3, c. 37, [enacting, that no insurance shall be made on any ship belonging to his Majesty or any of his subjects, or on any goods, merchandise, or effects, laden or to be laden on board thereof, interest or no interest, or without further proof of interest than the policy, or by way of gaming or wagering, or without benefit of salvage to the *assurers. And it is decided that one who [*175] has any interest may be insured to the extent of it, and any one may be considered to have an interest, who may be injured by the risks to which the subject-matter is exposed, or would but for such risks have a moral advantage in the ordinary and probable course of things.(*y*)]

(*v*) *Paterson v. Powell*, 9 Bing. 320, E. C. L. R. vol. 23.

(*x*) *Cook v. Field*, 15 Q. B. 475, E. C. L. R. vol. 69.

(*y*) *Lucena v. Crowford*, 2 B. & B. N. R. 300; *Briggs v. Merchant Traders' Ship Assurance Association*, 13 Q. B. 167, E. C. L. R. vol. 66.

STOCK-JOBGING ACT.—THE LORD'S DAY ACT.—SIMONY.—BILLS OF EXCHANGE FOR ILLEGAL CONSIDERATION.—RECOVERY OF MONEY PAID ON ILLEGAL CONTRACTS.

THERE are some other heads of statutable illegality which are frequently set up as affording an answer to any attempt to enforce contracts vitiated by them. I directed your attention, on the last occasion, to the defences which arise under the usury laws, and the laws enacted for prevention of gambling; noticing the invalidity of certain wagers not falling within the statutes against gaming, by reason of the Acts of Parliament which prohibit wagering insurances. The first class of cases to which I will advert this evening, consists of those contracts which fall within the prohibition of what are called the Stock-jobbing Acts.

The Act against stock-jobbing is the 7th of Geo. 2, c. 8, which was a temporary Act, but was continued and made perpetual by the 10th of the same reign, c. 8. And it enacts, in substance—for the section is a long and verbose one—but, in substance, it enacts, that all contracts in the nature of wagers, relating to the then present or future price of stock, or other public securities, shall be void; *and that all premiums [*177] paid on any such contracts shall be recoverable back again by an action of debt for money had and received, [whereby the plaintiff's action accrued to him, according to the form of the statute.]

[Contracts in the nature of wagers, as those words

are used in this statute, may very well be understood to comprehend cases where the vendor did not possess the stock and the purchaser did not intend to receive it, but those parties only intended to pay or receive, when the day for performing the contract should arrive, the difference between the actual price on that day, and the price which they agreed upon in their contract. But when the vendor was really possessed of the stock bargained to be sold, and intended to transfer it, and the purchaser intended to receive the stock, such contracts are not in the nature of wagers, and are not forbidden by the statute.^(z) “It has been said,” observed Lord Abinger, C. B., in delivering judgment in *Mortimer v. M’Callan*,^(a) a case where the plaintiff sold and transferred stock not being possessed of it at the time, the real owner transferring it for him, “that the plaintiff could not enforce his contract for the sale of this stock, because he had none at the time of the contract. *That general [*178] proposition certainly is not true. How many merchants are there who make contracts to sell things which they are not in possession of. Can it be doubted, that a man who has made a contract to sell that which he is not then possessed of, if he obtain means to perform that contract, and to deliver the thing sold by his own hands or by the agency of another, is entitled to recover the price of it? But it is said, that, by reason of the prohibition in the Act of Parliament, he could not sell this stock. Now that Act was made for the purpose of preventing what is declared to be an illegal trafficking in the funds by selling fictitious stock, merely

(z) *Sanders v. Kentish*, 8 T. R. 162; *Child v. Morley*, Id. 610; *Mortimer v. M’Callan*, 6 M. & W. 58.

(a) Id. 70; 7 M. & W. 20, S. C. on demurrer. But see the same case in Ex. Ch. 9 M. & W. 636.

by way of differences ; but it never was intended to affect *bonâ fide* sales of stock, or to say, if a man undertakes to sell stock to another, and transfers the actual stock and delivers it to him, and he accepts the stock, that is not a lawful transaction. That is not a case within the statute at all. True, the plaintiff had not the stock at the time it was purchased, but he had it before it was invested in the name of the defendant ; and whether he transferred it to the defendant himself or procured another person to transfer it for him, makes no difference. In point of fact, he procured stock, and through his instrumentality the defendant became possessor of the stock ; and therefore, whether he had it transferred into his own name first, and then re-transferred it, makes no difference."

[*179] * [By similar reasoning, it will appear, that, where the stock is only potentially in the possession of the vendor, and a real transfer is intended, the statute does not apply. (b) It is also held, that the statute refers only to those stocks which are ordinarily considered as the public funds or securities for which there is a guarantee by the Government that the dividends and capital shall be paid. (c) Thus, shares in incorporated or joint stock companies in this country, not being guaranteed by Government, do not fall within the stat. 7 Geo. 2, c. 8. (d) In accordance with this principle,] it has been decided on the construction of this Act of Parliament, that it was not intended to apply to any except British securities, and consequently, that it does not prohibit gambling in the foreign funds. The question was long contested, but

(b) *Oliverson v. Cole*, 1 Stark, 496, E. C. L. R. vol. 2.

(c) Per the Master of the Rolls, *Williams v. Trye*, 23 L. J (Chanc.) 860.

(d) *Id.* ; *Hewitt v. Price*, 4 M. & Gr. 355, E. C. L. R. vol. 43.

has been finally decided in many cases.(e) [But if in fact the one party did not intend to transfer, or the other to receive the stock, whether it were foreign or British, the transaction, although not forbidden by the statute we have just been considering, the stock not being that of the British Government, falls within the recent statute, 8 & 9 Vict. c. 109, s. 18, *be- [*180] fore mentioned, which enacts that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void.(f)]

[But, where the subject-matter of the contract consists of the public funds or securities, as before mentioned, and the contract itself is in the nature of a wager, it is void. If, therefore, a contract be made, to pay the difference which might become due between the plaintiff and the defendant on the settling day, on the sale of consols, it is one upon which the plaintiff cannot recover.(g) It will, therefore, appear plain, upon comparing the prohibition in this statute with what has before been said upon the effect of legal prohibitions upon contracts (see ante, p. 121), that if it be impossible to give effect to a contract of the kind we are now treating of, without having recourse to something forbidden by the Stock-jobbing Act, such contract cannot be enforced at all. This rule has already been illustrated in the case of *Cannan v. Bryce* (ante, p. 15), and it follows evidently from it that bills or notes given to secure money advanced for such a purpose cannot be recovered by any person guilty of

(e) *Wells v. Porter*, 2 Bing. N. C. 722, E. C. L. R. vol. 29; *Oakley v. Rigby*, Id. 732; *Robson v. Fallows*, 3 Bing. N. C. 392, E. C. L. R. vol. 32; *Elsworth v. Cole*, 2 M. & W. 31.

(f) *Gricewood v. Blane*, 11 C. B. 538, E. C. L. R. vol. 73; *Hill v. Campbell*, Guildhall, Feb. 1854, Q. B.

(g) *Sawyer v. Langford*, 2 C. & K. 697.

the illegal contract before mentioned, or by any other person who stands upon such guilty *owner's [*181] right: (*h*) even if a bond be given to such owner in substitution for such a bill or note, he cannot recover on the bond. (*i*) And where a broker was employed for his principal in illegal stock-jobbing transactions, and had paid the differences for him, and a dispute having arisen between them respecting the amount of those differences, it was referred to the plaintiff, who awarded a certain sum to the broker who thereupon drew on the principal for the amount and, he having accepted the bill, the broker indorsed it to the plaintiff: it was held, that, as the plaintiff knew of the illegality, he could not recover on the bill. (*k*)] .

Another class of prohibited contracts are those falling within the operation of the statute commonly known by the name of the Lord's Day Act. It is 29 Car. 2 c. 7, and it enacts that no tradesman, artificer, workman, laborer, or other person whatever, shall do or exercise any worldly labor, or business or work of their ordinary callings, upon the Lord's day (works of necessity or charity only excepted), and that every person of the age of fourteen years offending in the premises shall forfeit five shillings.¹ The contracts prohibited

(*h*) *Brown v. Turner*, 7 T. R. 630.

(*i*) *Amery v. Merywether*, 2 B. & C. 573, E. C. L. R. vol. 9.

(*k*) *Steers v. Lashley*, 6 T. R. 61.

¹ At common law, judicial proceedings alone seem to have been forbidden on Sunday: *Macalley's case*, 9 Coke, 66 b; *Comyn v. Boyer*, Cro. Eliz. 485; *Strong v. Elliott*, 8 Cowen, 28; *Sayles v. Smith*, 11 Wendell, 59; *Boynton v. Page*, 13 Id. 429; *Kepner v. Keefer*, 10 Watts, 233; all other transactions therefore done on that day depend as to their illegality upon statutory prohibition. The history of the regulations gradually adopted on this subject was thus sketched by

by this statute are, you will observe, not every contract made on Sunday, but contracts made in the exercise of

Gilechrist, J., in the recent case of *Allen v. Denning*, 14 New Hampshire, 136. "It appears," said he, "that the ancient Christians used all days alike for the hearing of causes, not sparing (as it seemeth) the Sunday itself. One reason for this was, that they might not imitate the heathens, who were superstitious about the observance of days; and also, that by keeping their own courts always open, they might prevent Christian suitors from resorting to heathen courts. Spelman's Original of the Terms, c. 17; *Swan v. Broome*, 3 Burrow, 1598. But the practice ceased with the reason for it, and in the year 516, a canon was made, '*Quod nullus episcopus vel infra positus die dominico causas judicare præsumat.*' This canon, with others of a similar character, was confirmed by William the Conqueror and Henry the Second, and so became part of the common law of England. But the canons extended no farther than to prohibit judicial business on Sundays; for fairs, markets, sports, and pastimes might still take place on the Sabbath. *Comyns v. Boyer*, Cro. Eliz. 485, decides that a fair held on Sunday is well enough, although by the 27 Hen. 6, ch. 5, a penalty was inflicted on him who sold on that day. The toleration of amusements, and the existence of fairs in England to a greater or less degree upon the Sabbath, are readily accounted for by their known accordance with the practice of Roman Catholic countries, among which was England until the Reformation in the reign of Henry the Eighth. With the spread of the reformed religion, and the consequent improvement in civilization, the views and manners of the people changed on the subject of the rational observance of the Sabbath, and in all Protestant communities laws were enacted to secure it, varying in their provisions with the peculiarities of the people. Pastimes of various kinds were prohibited by the 1 Car. 1, c. 1, and by the 29 Car. 2, ch. 7. All persons were prohibited from 'doing or exercising any worldly labor, business, or work of their ordinary calling upon the Lord's Day.' In the opinion of Lord Mansfield in *Swan v. Broome*, 3 Burrow, 1598, referred to in the above extract, the student will find much of the old learning on this subject.

It is believed that provisions, more or less similar to those of the statute of Charles, exist in all the United States. In New York, the statute refers only to "servile labor," and "exposing goods for sale." In South Carolina, New Hampshire, and Rhode Island, it has been nearly exactly copied. In many of the other States, such as Pennsyl-

[*182] a man's *trade or ordinary calling*: thus, *it has been decided in *R. v. Whitnash*, (1) that a con

(1) 7 B. & C. 596, E. C. L. R. vol. 14.

vania, Massachusetts, Maine, Vermont, and Connecticut, the provision are more strict, interdicting all secular labor, whether in one's ordinary calling or not. Thus, no action can be maintained for a deceit in the exchange of horses on Sunday: *Robeson v. French*, 12 Metcalf, 24 or a breach of warranty: *Lyon v. Strong*, 6 Vermont, 214; *Adams v. Harnell*, 2 Douglass, 73; nor for an injury received while travelling on that day, by reason of a defective highway (the journey not being one of necessity or mercy): *Bosworth v. Swansey*, 10 Metcalf, 36 (though it would be a work of necessity to repair the road on Sunday *Flagg v. Wilby*, 4 Cush. 244); or on a note given on that day: *Keefer v. Keefer*, 7 Watts, 232; and the like. There was a rather early decision in Massachusetts (*Greer v. Putnam*, 10 Mass. 312), to the effect that a plea that a note was void because executed on Sunday was bad on demurrer, but the case proceeded on the ground that the plea did not state on what part of Sunday the note was made, the act only extending between midnight on Saturday and the sunset of the next day; and though the authority of the case was more broadly applied in *Clapp v. Smith*, 16 Pick. 247, yet the recent cases have explained the decision on the ground just stated: *Bosworth v. Swansey*, 10 Metcalf, 364, arg.; *Robeson v. French*, 12 Id. 24.

In *Specht v. The Commonwealth*, 8 Barr, 313, it was held, affirming the previous decision of *Commonwealth v. Wolf*, 3 Ser. & Rawle, that the Pennsylvania Lord's Day Act was not at variance with the provision in the State constitution, declaring the right of freedom of conscience in religious matters, and a conviction, under the act, of one of the sect called Seventh Day Baptists was therefore sustained the decision being based upon the ground of a day of rest being necessary to the welfare of society, and that the mere prohibition of secular occupation did not interfere with the right of conscience. The case of *Cincinnati v. Rice*, 13 Ohio, 225, was decided upon a clause in the local statute, exempting persons who conscientiously kept holy the seventh day, and a somewhat similar provision is found in the Massachusetts statute.

But although a bond may be void because executed on Sunday, so that, as a bond or contract, no suit can be maintained upon it, yet if a suit founded on the previous liability of the defendant, the bond may be regarded as an acknowledgment of that liability, as there is

tract made on Sunday by a farmer for the hire of a laborer is valid. The Court decided, in the first place, that a farmer was not a person within the meaning of the statute at all, for that the meaning of the words "tradesman, artificer, workman, laborer, or *other person whatsoever*," was to prohibit the classes of persons named and other persons *ejusdem generis*, of a like denomination; and they did not consider a farmer to be so. And, secondly, they held that even if the farmer were comprehended within the class of persons prohibited, the hiring of the servant could not be considered as *work done* in his *ordinary calling*, for, said Mr. J. Bayley, "those things which are repeated *daily* or *weekly* in the course of trade or business are parts of the ordinary calling of a man exercising such trade or business; but the hiring of a servant for a year does not come within the meaning of those words."

The former of the two points decided in this case furnishes a very good exemplification of the celebrated rule of construction as applied to statutes, namely, that where an Act mentions particular classes of persons, and then uses *general* words, such as "*all others*," the general words are restrained to persons of the like de-

nothing to prevent a man from acknowledging the truth on Sunday, and consequently nothing to prevent its being given in evidence against him: *Lea v. Hopkins*, 7 Barr, 492; and in any case in which such a defence is set up, it is necessary that the statute be specially pleaded: *Fox v. Mench*, 3 Watts & Serg. 496; unless of course where local statutory or other rules of pleading have varied this general principle.—R.

See *Smith v. Bean*, 15 New Hamp. 576; *Hugg v. Millbury*, 4 Cushing, 243; *Nason v. Dinsmore*, 34 Maine, 391; *Goss v. Whitney*, 24 Vermont, 187; *Sumner v. Jones*, *Ibid.* 317; *Hooper v. Edwards*, 18 Alabama, 280; *Hilton v. Houghton*, 35 Maine, 143; *Stackpole v. Symonds*, 3 Foster, 229; *Rainey v. Capps*, 22 Alabama, 288.

scription with those specified. (m) The same construction was *put upon the Lord's Day Act in a subsequent case, that of *Peate v. Dicken*, (n) where it was decided *first*, that an attorney was not within the description of persons intended by the statute; and secondly, that if he were, an agreement made on Sunday to become personally responsible for the debt of a client, could not be said to fall within his *ordinary calling*.

[But, perhaps the second point illustrated by these cases is put in the clearest light by the cases of *Drury v. De Fontaine* (o) and *Fennell v. Ridler*, (p) in the former of which cases it was considered that the sale of a horse on a Sunday, by a person not being a horse dealer, was not void, such sale not being within the ordinary calling of the plaintiff; and in the second that a horse-dealer could not maintain an action upon a contract for the sale and warranty of a horse bought by him on a Sunday, it being obvious, that, in doing so, he was exercising the business of his ordinary calling. In accordance with these cases, it has been decided that one tradesman giving another, on the Lord's day, a guarantee for the faithful services of a traveller is not, in doing so, exercising his ordinary calling; (q) and the same conclusion was come to in the last case upon the subject, where it was decided that a recruiting officer *enlisting a soldier on a Sunday is not executing his ordinary calling on the Lord's day. (r) It has also been decided, that the owner and driver of a stage-coach is not included within the

(m) See *Sandiman v. Breach*, 7 B. & C. 96, E. C. L. R. vol. 14
Queen v. Nevill, 8 Q. B. 452, E. C. L. R. vol. 55.

(n) 1 Cr. M. & R. 422. (o) 1 Taunt. 131.

(p) 5 B. & C. 406, E. C. L. R. vol. 11.

(q) *Norton v. Powell*, 4 M. & Gr. 42, E. C. L. R. vol. 43. See
Scarfe v. Morgan, 4 M. & W. 270.

(r) *Wolton v. Gavin*, 16 Q. B. 48; E. C. L. R. vol. 71.

words, "other person whatsoever," forbidden to exercise his calling on the Lord's day.]

The cases in which the Act is most frequently sought to be applied are those of sales, of which you may see a remarkable instance in *Simpson v. Nichols*.^(s) [This was an action for goods sold and delivered. The defendant pleaded that they were sold and delivered by him to the plaintiff in the way of his trade on a Sunday, contrary to the statute; the plaintiff replied, that, after the sale and delivery of the goods, the defendant kept them for his own use, without returning or offering to return them, and had thereby become liable to pay as much as they were worth. This replication was considered to be no answer at all to the plea. A case had been cited in the argument,^(t) where the defendant, having purchased a heifer of a drover on a Sunday, and having afterwards kept it and expressly promised to pay for it, was held liable by virtue of that promise. But Mr. Baron Parke observed,^(u) that, as the property in the goods passed by delivery, the promise made on the following *day to pay [*185] for them could not constitute any new consideration, and therefore he doubted whether that case could be supported in law. Perhaps, however, the Court considered that case as within the rule mentioned ante, page 117, and that the express promise there mentioned might revive the precedent consideration, which might have been enforced at law through the medium of an implied promise, had not the party been exempted by the positive rule of law forbidding such a contract on the Lord's day.^(x)]

(s) 3 M. & W. 240.

(t) *Williams v. Paul*, 6 Bing. 653, E. C. L. R. vol. 19.

(u) *Simpson v. Nichols*, 5 M. & W. 702.

(x) See *Scarfe v. Morgan*, 4 M. & W. 270. See per Bosanquet, J., 6 Bing. 655, E. C. L. R. vol. 19.

Yet, from the application of the Act to these cases even, there are some exceptions; some created by the Act itself, which permits food to be sold in inns and cookshops to persons who cannot be otherwise provided and for the sale of milk at certain hours; others by 1 & 11 Will. 3, c. 24, s. 14, which legalises the sale of mackerel before and after divine service; others by 6 & 7 Will. 4, c. 37, which allows *bakers* to carry on their business to a certain extent and under certain restrictions, see s. 14, and, indeed, even before the passing of that Act or of the 34 Geo. 3, c. 61, on the same subject, it had been decided that a baker baking provision for his customers was out of the purview of the Act altogether, as being a work of necessity; (y) and there are other exceptions created by other particular enactments, as, for instance, in case of hackney carriages.¹

Another class of contracts falls within the prohibi-

(y) See *R. v. Cox*, 2 Burr. 787; *R. v. Younger*, 5 T. R. 449.

¹ A contract, however, for the sale of goods made on Sunday, is not affected by the statute, unless it is a complete contract on that day. *Butler v. Lee*, 11 Alab. 885; *Adams v. Gray*, 19 Vermont, 358, where the subject is elaborately examined. Thus, if the article was not to be delivered, or the price paid till another day, the contract would not be, under the Statute of Frauds, binding till that was done: *Bloxson v. Williams*, 3 Barn. & Cress. 232; *Beaumont v. Brengeri*, 5 Com. Bench, 301. So of a promissory note written on that day, but not delivered till another: *Lovejoy v. Whipple*, 18 Vermont, 379; *Clough v. Davis*, 9 N. Hamp. 500. And although the consummation of the transaction may occur on Sunday, yet if the party seeking to enforce the rights growing therefrom, had ceased all his agency in the matter before that day, there will be no invalidation as to him; as where a case was submitted to arbitrators late on Saturday night, who made up their award early on Sunday morning, it was held that assumption might be maintained on the award, for the plaintiff had no voluntary agency in consummating the transaction on that day: *Sargeant v. Butts*, 21 Vermont, 101; *Richardson v. Kimball*, 28 Maine, 475.—R

tion of the Acts aimed against *simony*. There are two statutes on this subject: the 31 Eliz. c. 6, and 12 Anne, c. 12; the former of which enacts that if any *patron*, for any corrupt consideration, by gift or promise, directly or indirectly, shall present or collate any person to any ecclesiastical benefice or dignity,—such presentation shall be void, the presentee shall be incapable of enjoying the benefice, and the Crown shall present to it.

The other statute is that of 12 Anne, st. 2, c. 12, which enacts, that if any person, for money or profit, shall procure in his own name, or in the name of any other, the next presentation to any living ecclesiastical, and shall be presented thereupon, the contract is declared to be simoniacal, and the presentation is to devolve upon the Crown.

It was decided on the construction of the former Act, that of Elizabeth, very soon after it passed—that a contract to purchase a living actually vacant at the time of the purchase was a simoniacal contract, and avoided by the operation of the statute. That was taken for granted in *Baker v. Rogers*,^(z) which was decided but a very short time after the passing of the Act; but still, although, after the statute of Elizabeth, it was admitted, that to *contract for the right to present to a church *actually void* was simony, yet, it was also held, that it was not simony to purchase the next presentation at a time when the church was full, and it was therefore uncertain when that presentation would accrue.^(a) And so the law continues to be to this day, with a qualification introduced by the statute of Anne, the nature of which I am about to explain to you.

The statute of Elizabeth, and the decisions upon it,

(z) Cro. Eliz. 788.

(a) See Cro. Eliz. 685, *Smith v. Shelborne*.

had, as I have just said, established two points: first, that the right to present to an actually void benefice could not be purchased; secondly, that the right of next presentation might be so, provided that the living was not full at the time of the contract. Certain clergymen took advantage of this state of the law to purchase next presentations, with the intention of presenting themselves upon the occurrence of a vacancy. This practice, being considered highly indecorous, the statute of the 12th of Anne was passed to put a stop to it, and that Act renders it illegal and simoniacal on the part of a *clergyman* to purchase the next presentation to a living actually full, and to present himself, leaving the right of a layman to do so just as it stood before under the Act of Elizabeth.

[*188] The operation of these two statutes was *elaborately discussed, first in the Queen's Bench and subsequently in the House of Lords, in the great case of *Fox v. Bishop of Chester*. (b) In that case the incumbent of a living was exceedingly ill, and upon his deathbed. The proprietor of the advowson and another person being aware of this, and believing that his death was at hand, agreed for the sale of the next presentation, and, in order to carry the agreement into effect, executed a deed a few hours only before his death, which purported to convey the advowson to the vendee for ninety-nine years, but contained a proviso for reconveyance as soon as one presentation should have been made. After the death of the incumbent the vendee under this deed presented a clergyman who was in no way privy to the bargain; and, consequently the only question was as to the legality of the bargain itself, and it was strongly urged that it was void; for it was contended, that the transaction was a fraud.

(b) 2 B. & C. 635, E. C. L. R. vol. 9; and 6 Bing. 1, E. C. L. R. vol. 19.

upon the statute of Elizabeth, since, under the circumstances, the living was for every *practical* purpose vacant at the time of the contract, although it was possible that the incumbent might linger on for a few hours after the delivery of the deed. And such was the opinion of the Court of Queen's Bench, who delivered their judgment *accordingly. But it was [*189] carried to the House of Lords, and there reversed according to the unanimous opinion of the other Judges, and of Lord Eldon, who was at that time Chancellor.

Connected with, and indeed, forming a part of this branch of the subject, are the decisions with regard to *resignation bonds*, the history of which is extremely curious.(c)

(c) The following summary of the Law of Simony as it now stands, is given in Mr. Cripps's able "Treatise on the Laws relating to the Church and Clergy," p. 495.

"It is not simony for a layman, or spiritual person not purchasing for himself, to purchase while the church is full either an advowson or next presentation, however immediate may be the prospect of a vacancy; unless that vacancy is to be occasioned by some agreement or arrangement between the parties.

"Nor is it simony for a spiritual person to purchase for himself an *advowson*, although under similar circumstances. If either a layman or spiritual person purchase an advowson while the church is vacant, a presentation by the purchaser upon any future avoidance, after the church has been filled for that time, is not simony.

"It is simony for any person to purchase the next presentation while the church is vacant.

"It is simony for a spiritual person to purchase for himself the next presentation, although the church be full.

"It is simony for any person to purchase a next presentation, or, if the purchase be of an advowson, the next presentation by a purchaser would be simoniacal, if there is any agreement or arrangement between the parties at the time of the purchase for causing a vacancy to be made.

"If any person purchase an advowson while the church is vacant, a presentation by the purchaser for that vacancy is simony.

[*190] It had become a very common practice when the patron of a living had a son intended for the Church, and the living happened to become vacant during the young man's minority, for the patron to present a clergyman, who entered into an agreement to resign as soon as the patron's son should be of age to hold the preferment. These contracts were usually made by way of bond, conditioned to resign on the contingency happening, and which, from the nature of the transaction, acquired the name of *Resignation Bonds*. At first a doubt was entertained whether these bonds did not offend against the provisions of the Act of Elizabeth, since the clergyman who executed such an instrument could hardly be said to have been presented gratuitously, inasmuch as he agreed to bind himself in the penal sum as a condition precedent to his obtaining the preferment, and inasmuch as, in case of his refusing to resign, and allowing the penal sum to be forfeited, he actually would have given up that sum of money for the sake of holding the living. However, in *Johnes v. Lawrence*, (*d*) first the Queen's Bench, and then the Exchequer Chamber decided that such an instrument was good: and the reason assigned for this was, that a father is bound by nature to provide for his son; and therefore, that though the clergyman was presented under an agreement, yet it was not an agreement upon any corrupt consideration, but more resembled the case of a bond to resign in case of non-residence or of taking any other living, which had both been decided to be for the good of the public, and free from any objection on the score of simony. But still another question remained, for in course of time it became usual to exact from the clergyman a bond conditioned

to resign—not on the patron's son or any other particular person becoming qualified to hold the living—but to resign *generally* at the request of the patron whenever he should think proper to signify it. These bonds, which were called *General Resignation Bonds*, stood, it is obvious, on a different footing from the former ones, for they reduced the clergyman to a state of complete dependence on the will and pleasure of the patron. However, in *Ffytche v. The Bishop of London*,^(e) which was finally decided in the year 1783, first the Court of Common Pleas, and then that of the King's Bench, decided that such bonds were valid. But, on a writ of error to the House of Lords, that decision was reversed by a majority of lay peers voting against the expressed opinion of a majority of the Judges. After that period there was for a long time a strong inclination on the parts of the Courts to confine the authority of that decision of the peers to cases precisely similar to itself, as you will [*192] *see from the judgments in *Bagshaw v. Bos-* ley,^(f) *Partridge v. Whiston*,^(g) *Newman v. Newman*.^(h) However, at last, in the year 1826, the matter came again before the House of Lords in the case of *Fletcher v. Lord Sondes*,⁽ⁱ⁾ under the following circumstances.

An action was brought in the Queen's Bench by Lord Sondes against the Reverend William Fletcher upon a bond of 12,000*l.* The condition was not to commit dilapidations, and to resign within a month after request the rectory of Kettering, in the County of Northampton, to which Lord Sondes then presented him, in order that his Lordship might be enabled to

(e) *Cunningham on Simony*, 52.

(f) 4 T. R. 78.

(g) *Id.* 359.

(h) 4 M. & Sel. 71.

(i) 3 Bing. 501, E. C. L. R. vol. 11; in Dom. Proc.

present one of two younger brothers, whose names the condition specified. Upon this bond, judgment was allowed to go by default; and a writ of error being brought in the House of Lords, the Judges were called on to deliver their opinions, which they all did with the exception of Mr. J. Bayley, Mr. J. Holroyd, and Mr. J. Littledale. There was a difference of opinion amongst them, and they delivered their opinions therefore seriatim; the Judges who thought the bond valid being L. C. J. Best, Mr. J. Burrough, and Mr. J. Gaslee; those who thought it invalid being the L. C. Abbott, C. B. Alexander, Mr. J. J. A. Park, B. Garrow, B. Graham, and *B. Hullock. The Chancellor agreed with the majority, and the judgment of the Court below in favor of the plaintiff was reversed. Now the bond in this case was not a general resignation bond. It was a special one in favor of the obligees, two brothers. And the effect of the decision was not only to establish the decision in *The Bishop of London v. Ffytche*, but to overturn the decisions which had previously taken place in favor of special resignation bonds, and render all bonds conditioned for the resignation of a clergyman illegal. But as the consequences of this would have been exceedingly hard upon persons who had executed special resignation bonds at the time when they were looked upon as legal, the Archbishop of Canterbury immediately brought in a bill which he laid on the table of the House as soon as the Lords had assented to the Chancellor's motion to reverse the judgment of the Queen's Bench in *Fletcher v. Lord Sondes*, and which afterwards passed into law. It is the 7 & Geo. 4, c. 25, which confirms such bonds and contracts if made before the 9th of April, 1827, the day of the decision in *Fletcher v. Lord Sondes*, for resignation in favor of one, or one of two specified persons. An

thus the law continued ; all general bonds of resignation being void, and special ones in favor of one person, or one of two persons, good if before April 9th, 1827, and void if subsequent to that day, until the passing of the 9 Geo. 4, c. 94, which rendered special [*194] *resignation bonds and contracts entered into after the passing of that Act good, if in favor of one or one of two persons standing in the relation of uncle, son, grandson, brother, nephew, or grand-nephew to the patron, by blood or marriage.

Thus stands this curious branch of law. Resignation contracts prior to April 9th, 1827, being governed by 7 & 8 Geo. 4, c. 25, conjointly with the statutes of Elizabeth and Anne, between that day and the passing of 9 Geo. 4, c. 94, by the statutes of Anne and Elizabeth, as explained in *Fletcher v. Lord Sondes* ; and, subsequently, by the 9 Geo. 4, c. 94, in conjunction with the statutes of Anne and Elizabeth.

Another class of illegal contracts, of not unusual occurrence, consists of those which are invalid, on the ground that they amount to illegal attempts to charge an ecclesiastical benefice. The obvious impolicy of allowing the provision made by law for the support of the church to be diverted to secular purposes, occasioned the enactment of the 13 Eliz. c. 20, which directs that all *chargings* of benefices other than rents reserved upon the leases which the law allows to be made should be void. This Act was repealed by 43 Geo. 3, c. 84, but revived again by the repeal of the latter Act by 57 Geo. 3, c. 99.(k) The cases have mostly arisen on contracts made for the purpose of charging an annuity *granted by a clergy- [*195] man upon his benefice. These contracts are

(k) *Shaw v. Pritchard*, 10 B. & C. 241, E. C. L. R. vol. 21.

held void,^(l) and where it appears on the face of a warrant of attorney given by a clergyman, that his intention in executing it was that the benefice should be sequestered towards the liquidation of an annuity or other charge, the Courts will set it aside;^(m) though they will not do so where no intention to create such a charge appears on the face of the warrant of attorney itself, though its effect may and probably will be to occasion an execution to issue, under which the profits of the benefice will be sequestered.⁽ⁿ⁾

[A contract may also be illegal by contravening the very useful statutes which prescribe a uniformity of weights and measures in the United Kingdom. By the 5 Geo. 4, c. 74, s. 23, a great number of statutes upon this subject were repealed, and by this Act, and by the 5 & 6 Will. 4, c. 3, the weights and measures of the country are now regulated. By sect. 6 of the latter Act, the Winchester bushel, the Scotch ell, and all local or customary measures are abolished, and every person who shall sell by any denomination of measure [*196] other than one of the imperial measures or some multiple or aliquot part thereof, shall be liable to a penalty not exceeding 40*s.* for every sale provided that this Act shall not prevent the sale of any articles in any vessel, where such vessel is not represented as containing any amount of imperial measure, or of any fixed, local, or customary measure

(l) See *Mouys v. Leake*, 8 T. R. 411; *Alchin v. Hopkins*, 1 Bing. N. C. 99, E. C. L. R. vol. 27; *Flight v. Salter*, 1 B. & Ad. 673, E. C. L. R. vol. 20; *Walker v. Crofts*, 20 L. J. (Exch.) 257; 6 Exch. 1, S. C.

(m) *Saltmarshe v. Hewett*, 1 A. & E. 812, E. C. L. R. vol. 28; *Newland v. Watkins*, 9 Bing. 113, E. C. L. R. vol. 23.

(n) *Bendry v. Price*, 7 Dowl. 753; *Colebrook v. Layton*, 4 B. & Ad. 578, E. C. L. R. vol. 24; *Moore v. Ramsden*, 7 A. & E. 898, E. C. L. R. vol. 34; *Sloane v. Packman*, 11 M. & W. 770.

theretofore in use. By sect. 7, heaped measure is abolished, and all bargains, sales, and contracts which shall be made by it, are rendered null and void; and articles which before this act were usually sold by it; may be sold by a measure, filled as nearly to the level of the brim as their size and shape will admit, or by weight, s. 8. By sec. 9, coals must be sold by weight, and all articles, except the precious metals and precious stones, and drugs, must be sold by Avoirdupois weight, but the precious metals and precious stones may be sold by Troy weight, and drugs, when sold by retail, by Apothecaries weight: see 16 & 17 Vict. c. 29, s. 21, s. 10. By sect. 11, the stone is to consist of 14 pounds, the hundred weight of 8 stones, and the ton of 20 hundred weight. It has been decided that this statute does not apply to contracts to be performed abroad,^(o) but only to contracts where the goods are to be weighed or measured in this country; and it has been held, that, even in this country, a contract for the sale of iron by the ton long weight, consisting *of 20 [197] hundred weights, of 120 lbs. each, is not illegal, it being considered that the object of the statute, to be collected from it, was to abolish local and customary weights and measures, and to establish uniformity, and consequently, did not apply to a weight like the long hundred, which was not a local or customary weight, but in use all over the country. From this opinion, however, Parke, B., dissented.^(p)

[It may also be convenient to add in this place,^(q) that contracts of insurance, wherein the parties on whose account the policy is made have no interest, are also illegal, it having been enacted by the statute 14

(o) *Rosseter v. Cahlmann*, 8 Exch. 361.

(p) *Jones v. Giles*, 23 L. J. (Exch.) 292; 10 Exch. 119, S. C.

(q) *Supra*, p. 172.

Geo. 3, c. 48, that no insurance shall be made by any person on the life of any person, or on any other event whatsoever, wherein the person for whose use, benefit, or on whose account such policy shall be made, shall have no interest, and that every assurance made contrary to the intent thereof shall be null and void. It is, therefore, important to ascertain what is to be considered as an interest in the event within the meaning of this statute. It is clear that a creditor has an interest in the life of his debtor,^(r) that a trustee may insure for the benefit of his cestui que trust,^(s) that a wife has [*198] *an interest in her husband's life,^(t) and that a man may assure his own life, which is the common case of every day's experience; but he cannot evade the statute by doing so with the money of another, which other is to derive the benefit of the assurance, and has no interest in his life, since so to do would be virtually enabling a person to effect an assurance on an event wherein he has no interest.^(u)

[In some cases also joint stock companies are not able to make a legal contract, but this will be treated of hereafter.^(x)]

I have now touched upon the classes of contracts invalidated by express enactment, which are of most frequent practical occurrence, and it remains to mention one point, also arising from a late statute, which has done away with a distinction which was formerly found an exceedingly troublesome one, and frequently very unjust in its operation.

^(r) *Von Lindenau v. Desborough*, 3 Car. & P. 353, E. C. L. R. vol. 14; *Cooke v. Field*, 15 Q. B. 460, E. C. L. R. vol. 69.

^(s) *Tidswell v. Ankerstein*, Peake, 151; *Crauford v. Hunter*, 8 T. R. 22.

^(t) *Read v. Royal Exchange Ass. Co.* Peake Ad. C. 70.

^(u) *Wainwright v. Bland*, 1 M. & W. 32.

^(x) See "Contracts by Public Companies," post.

You are probably aware that the general rule of the law of England is that a *contract* is not *assignable*; that is, that a man who has entered into a contract cannot transfer the benefit of that contract to another person, so as to put that other person in his own place, and entitle *him to maintain an action upon it in case [*199] of its non-performance. But you are probably also aware, that there are some contracts, which, by the operation either of a statute, or of some peculiar rule of commercial law, are exempted from the operation of the above rule, and rendered transferable in the same way as any other property from man to man.

Such are bills of exchange, which, by the law merchant, are transferable by *indorsement* if payable to order, by *delivery* if payable to bearer. Such, too, are promissory notes, which, by the statute 4 Anne, c. 9, are placed on the same footing as bills of exchange. Now, where some one of these instruments had been made upon an illegal consideration; where, for instance, a bill of exchange was accepted for an illegal gambling debt, it is obvious that no action could be maintained between the original parties to it, for instance, in the case I have just put, by the drawer of such a bill against the acceptor of it; for, as between them, it is the common case: they both knew of the illegality, and nevertheless, with their eyes open, made it the consideration of their contract. But, where the instrument had gone out of the hands of the person to whom it was originally given, and had got into the hands of some third person, the case is very much altered; for he might not, and, probably, did not know of any illegality; *and, if he did not, it was [*200] hard that he should lose the benefit of that for which he had paid, in consequence of the illegal act of other persons, in which he did not participate, and of

which he did not know. For instance, to take again the same example :—*A.* loses 100*l.* to *B.* at whist, and accepts a bill for the amount. If *B.* afterwards sues *A.* on that bill, and *A.* pleads the illegality, this, though not in conformity with the principles of honor, cannot be said to be a hardship upon *B.*, for he knew when he sat down to play, and he knew when he drew the bill, that he could not enforce such a demand. But, suppose, instead of suing on the acceptance himself, he had procured *C.* to discount it, and had indorsed it to him, and *C.* had paid full value for it, and knew nothing of the gaming debt for which it was given, in such a case it would be an exceedingly hard thing indeed to prevent *C.* from recovering the amount from the acceptor. Yet, notwithstanding this, there were till lately several cases in which he would have been precluded from doing so.¹

The law stood thus :—Whenever illegality depended on the common law, or on an Act of Parliament which did not in express terms render the security *void*, *there* the Courts applied the rule which reason and justice dictate, and held, that the person who had given value for the security, and had taken it without notice that [*201] *it was affected by any illegality, was entitled to recover upon it. There were, however, some cases, in which, by the positive enactments of particular statutes, the security was rendered void. Such, for instance, was an acceptance of the description I have just supposed, given for a gaming debt. Such

¹ These cases were *Bowyer v. Bampton*, 2 Strange, 1155; *Peacock v. Rhodes*, Dougl. 636; *Lowe v. Walker*, Id. 736; *Ackland v. Pearce*, 2 Campb. 599. The words of the usury and gaming acts were thought too strong to be got over, and the law has been held the same way under similar statutes on this side of the Atlantic: *Unger v. Boas*, 1 Harris (Pa.), 602; *Lucas v. Waul*, 12 Smedes & Marsh. 157.—R.

also, at one period, was a bill or note given upon a usurious consideration. But the hardship in the case of usury was found so great, that a particular Act, 58 Geo. 3, c. 93, was passed in order to put an end to it. And, at length, stat. 5 & 6 Will. 4, c. 41, has altogether abolished the distinction and the grievances which it occasioned, by enacting that such instruments shall be no longer *void*, but shall be deemed and taken to have been given for an *illegal consideration*; the consequence of which is, that they are still void as between the original parties, and also as against all persons who have taken them with notice of the illegality, or after they had become overdue, or without giving value for them; but good in the hands of every person who has given value, and taken the instrument before it was due and bona fide.(y)¹

(y) See *supra*, p. 172.

¹ The provisions of the statute of 58 Geo. III, c. 98, were adopted in the New York Revised Statutes, v. 1, 772, § 5, under which acts it has been obviously held, that as soon as the defendant shows there has been usury between the prior parties, he casts on the plaintiff the burden of proving that he is a holder for value: *Wyatt v. Campbell*, *Moody & Malk.* 80; *Hackley v. Sprague*, 10 *Wendell*, 113; *Young v. Berkeley*, 2 *New Hamp.* 410; *Williams v. Little*, 11 *Id.* 66; *Henrick v. Andrews*, 9 *Porter*, 10; as is the case in every instance where fraud, duress, or illegality is shown between the prior parties: *Monroe v. Cooper*, 5 *Pick.* 412; *Vallet v. Parker*, 6 *Wend.* 615; *Beltzhoover v. Blackstock*, 3 *Watts*, 26; and it seems at one time to have been thought that if the defendant could prove *want* or *failure* (not an *illegality*) of consideration between the prior parties, this would throw on the plaintiff the burden of proving himself a holder for value: *Grant v. Vaughan*, 3 *Burrow*, 1516; *Patterson v. Hardacre*, 4 *Taunt.* 144; *De la Chaumette v. Bank of England*, 2 *Barn. & Cress.* 208; *Heath v. Sansom*, 2 *Barn. & Adolph.* 291; but in *Whitaker v. Edmunds*, 1 *Mood. & Rob.* 366, *Patterson, J.* said, "Since the decision in *Heath v. Sansom* (2 *B. & Ad.* 291), the consideration of the Judges has been a good deal called to the subject, and the prevalent opinion

[Although, since the passing of this statute, many alterations have been made in the law of gaming, yet the stat. 5 & 6 Will. 4, c. 41, is still in force,(z) and the law is still as just described.]

[*202] *There is one other point which I will notice before altogether leaving the head of illegality. I have hitherto spoken of illegality as avoiding a contract, and of course as operating by way of defence to any action brought upon the contract which it affects. But put the case that an illegal contract has been in part performed—that money, for instance, has been paid in pursuance of it—*no action will lie to recover that money back again.* At an early period of the law it was thought that such an action might be perhaps maintainable upon the ordinary principle, that an action will lie to recover back money which has been paid on a consideration which has failed.

(z) 8 & 9 Vict. c. 109, s. 15; see Bayley on Bills, by Dowdeswell, 524.

amongst them is, that the courts have of late gone too far in restricting the negotiability of bills and notes. If, indeed, the defendant can show that there has been something of a fraud in the previous steps of the transfer of the instrument, that throws on the plaintiff the necessity of showing under what circumstances he became possessed of it: so far I accede to the case of *Heath v. Sansom*, for there were in that case circumstances raising a suspicion of fraud; but, if I added on that occasion, that even independently of these circumstances of suspicion, the holder would have been bound to show the consideration which he gave for the bill, merely because there was an absence of consideration as between the previous parties to the bill, I am now decidedly of opinion that such doctrine was incorrect." The opinion thus expressed, has since been confirmed in many cases. See also *Heydon v. Thompson*, 1 Adolph. & Ell. 210; *Low v. Chifney*, 1 Bing. N. C. 267; *Knight v. Pugh*, 4 Watts & Serg. 448, where the reason for the change of decision, is thus clearly given. "In cases other than those of negotiable notes obtained or put in circulation by fraud or undue means, the maker, by its negotiable character, agrees that the payee shall put it in circulation. He has no right, therefore, to complain of his own act; and a holder placing confidence in such paper, ought not to be compelled to prove consideration."—R.

Thus, for instance, in the common case of an insurance, supposing that I insure a ship during a voyage, and she never sails upon it, I should be entitled to recover back the money as paid upon a consideration which had failed: for the consideration for my paying the premium was the risk the underwriter was to take upon himself; but as the risk was to be contemporaneous with the voyage, and as that never commenced, so neither did the risk, and, consequently, nothing was ever given in exchange for the money. So, in the ordinary case of an action for deposit. If *A.* sells an estate to *B.*, *B.* paying a part of the purchase-money as a deposit, if *A.* afterwards prove unable to make out a title, *B.* may recover back the money deposited for the consideration; for it was the sale which *has become abortive. Such are the common [*203] cases, such the common rule: where money has been paid upon a consideration which totally fails, an action will lie to recover it back again. But it is otherwise where the contract was an illegal one. Where money is paid in pursuance of an illegal contract, the consideration of course fails, for it is impossible for the party who has paid the money to enforce the performance of the illegal contract. Still, no action will lie to recover it back again. The reason of this is, that the law will not assist a party to an illegal contract. He has lost his money, it is true, but he has lost it by his own folly in entering into a transaction which the law forbids. You will see instances of this in the cases cited below, (a) the last of which is the very case I put, that of an insurance, in which if the risk be not run the premium may be recovered back again;

(a) *M'Kinnell v. Robinson*, 3 M. & W. 441; *Howson v. Hancock*, 8 T. R. 575; *Browning v. Morris*, Cowp. 790; and *Lubbock v. Potts*, 7 East, 449.

but in *Lubbock v. Potts* the insurance was an illegal one, and it was therefore held, that, though it could not have been enforced, the insured should not recover back the premium. The point is forcibly put by L. C. J. Wilmot, in his celebrated judgment in *Collins v. Blantern*, which I have several times cited from 2 Wilson, 341. "Whoever," says his Lordship, "is a party to an unlawful contract, if he have once paid [*204] the *money contracted to be paid in pursuance thereof, he shall not have the help of a Court to fetch it back again. You shall not have a right of action when you come into a Court of Justice in this unclean manner to recover it back."¹

To this rule, however, there are two exceptions: The first is, *where the illegality is created by some statute, the object of which is to protect one class of men against another*, or where the illegal contract has been extorted from one party by the oppression of the other. In cases of this sort, although the contract is illegal, and although a person belonging to the class *against* whom it is intended to protect others cannot recover money he has paid in pursuance of it, yet a person belonging to the class to be protected may, since the allowing him to do so renders the Act more efficacious. You will see this proposition illustrated by the case of *Smith v. Bromley*,^(b) which turned on the application of one of the old Bankrupt Acts. That Act, to prevent practices on bankrupts who had not obtained

(b) 2 Dougl. 696, note.

¹ The familiar maxim applies, "*In pari delicto, potior est conditio defendentis*;" and instances of its application may be found in *Worcester v. Easton*, 11 Mass. 368; *Merion v. Huntington*, 2 Connect. 209; *Perkins v. Savage*, 15 Wendell, 412, and in many other cases. *White v. Hunter*, 3 Foster, 128.—R.

their certificates, and who for the sake of obtaining them were likely to be willing to submit to any terms, however hard, that might be imposed upon them, vacated all securities given by the bankrupt or any one on his behalf, in consideration of the signature of the certificate. A creditor refused to sign the *certificate unless a sum of money was paid [*205] him by a friend of the bankrupt's, and, the money having been paid, it was held that the person who paid it might recover it back again. [In like manner one of the old Lottery Acts forbade, under a penalty, the insuring of lottery tickets. The plaintiff had paid a sum of money to the lottery office keeper as premiums for the purpose thus forbidden, and was held entitled to recover it back as money received to his use.(c) The Acts against usury now repealed, made the taking money, reward, or promise of reward, by the informer or plaintiff suing for the penalties of usury, in order to compound with any person offending against those laws, very highly penal ; the object being to prevent the person so offending from being harassed by vexatious actions and informations. It was, therefore, held, that, where the defendant had in a former action sued the plaintiff for the penalties of usury in a transaction with another person, and the plaintiff had, in order to get rid of that penal action, compounded with the defendant, by paying him a large sum of money, he might recover it back from the defendant, the prohibition against compounding such actions being made for the protection of the party sued in them. The Court considered, that, although the plaintiff was guilty *of usury, and liable to the penalties for [*206] usury, he was not liable to be harassed by

(c) *Jacques v. Golightly*, 2 Bl. 1073; *Jacques v. Withy*, 1 H. Bl. 65.

actions commenced for the purpose of being compounded. His criminality was collateral to the offence of compounding, his consciousness of his usurious dealings and dread of the consequences laid him at the mercy of the defendant, and enabled the latter to effectuate an act of extortion by procuring the payment of a sum of money; and that, in respect of the criminal offence of compounding, the plaintiff was the person whose situation was taken advantage of against the object of the statute, which, for his protection, made such compounding illegal. (d)

[Very similar to the case of *Smith v. Bromley* above cited, is that of *Smith v. Cuffe*, (e) where the defendant, who was a creditor of the plaintiff, entered into an agreement with the plaintiff and his other creditors, to accept a composition of 10s. in the pound on the debts due to them from the plaintiff. The defendant would not enter into this agreement except upon the consideration that the plaintiff should give him his promissory note for the remainder of his debt. The note was given, the 10s. in the pound paid, the defendant passed away the note, and the holder compelled the [*207] plaintiff to pay it. The Court decided that *the plaintiff might recover back from the defendant the amount of the note so paid. In this case it was strongly argued, that, both parties having been guilty of a fraud upon the creditors, the case was within the rule *in pari delicto, potior est conditio defendentis*; but Lord Ellenborough said, this is not a case of *par delictum*, but of oppression on one side, and submission on the other; it can never be predicated as *par delictum*, when one holds the rod, and the other bows to it; there was an inequality of situation between these parties

(d) *Williams v. Hedley*, 8 East, 378.

(e) 6 M. & Selw. 160.

one was creditor, the other debtor, who was driven to comply with the terms which the former chose to enforce. And is there any case, where, money having been obtained extorsively and by oppression, and in fraud of the party's own act as it regards the other creditors, it has been held that it may not be recovered back? On the contrary, I believe it has been uniformly decided, that an action lies.

[This case has been approved and acted on in the more recent case of *Horton v. Riley*,^(f) where the defendant, being a creditor of the plaintiff, entered into a similar agreement to that in *Smith v. Cuffe*, both with the plaintiff and his other creditors, and with the plaintiff himself privately, who promised in addition to keep in his own hands the note which was given for the remainder of the *debt; but he negotiated the note, and the holder enforced [*208] payment from the plaintiff; under these circumstances, it must be evident, that if sued by the defendant upon the note, he would have had a good defence against him. Of this defence he was deprived by the defendant's having handed the note over, whereby the plaintiff was compelled to pay the money, and had therefore a right to recover it back from the defendant. The agreement in this case, said Lord Abinger, makes it a stronger case even than *Smith v. Cuffe*, and I see no reason why we should depart from that decision.]

The other exception is that, *when money has been paid in pursuance of an illegal contract, but paid not to the other contracting party but to a stakeholder, then either party may recover it back again*; for instance, if parties agreed to play at an illegal game, and each

(f) 11 M. & W. 492.

deposited his stake in A.'s hands, either might recover it back from A.; for it is obvious, that, in this case, to allow the money to be recovered is to allow the parties a *locus poenitentiae*, within which they may repent of their illegal contract, and refrain from completing it at all. [Thus it was held, before the recent alteration of the Gaming Acts, and would, as appears by what has been said upon that head of law, be so now, that if a wager be deposited with a stakeholder, to be paid over on the event of a battle to be fought by the parties laying the wager, and it be demanded from him [*209] before it has been *paid over, the party demanding may recover it from the stakeholder, although the battle has been fought,^(g) but it did not appear which party had succeeded.]

I have now done with the contract itself. I have stated the various points relating to the contract itself, the consideration, and the effect of illegality on either. In the next Lecture I shall speak of the parties to it.

(g) See *Cotton v. Thurland*, 5 T. R. 405; *Smith v. Bickmore*, Taunt. 474; *Hastelow v. Jackson*, 8 B. & C. 221, E. C. L. R. vol. 15; *Hodson v. Terrill*, 1 C. & M. 797, E. C. L. R. vol. 41.

PARTIES TO CONTRACTS.—WHO ARE INCOMPETENT TO
CONTRACT.—INFANTS.—WIVES.

I CONCLUDED in my last Lecture, the consideration of the contract itself, having spoken of the different sorts of contract, of the consideration necessary to support a contract without specialty, and the effect of illegality in invalidating all contracts whatever. The next branch of the subject relates to the *parties to the contract*. Now this, you will at once perceive, involves a double consideration.

First, regarding the *ability* of the parties to the contract to contract at all.

Secondly, regarding their ability to enter into this or that particular sort of contract; for (as I shall have to explain more at length to you) there *are* persons who are allowed by the law to contract, but are not allowed to contract in the same way as an ordinary individual: for instance, a corporation may contract *by deed*, but cannot, except in certain cases which I shall presently specify, contract in any other manner. However, although these two considerations are in themselves distinct, yet I think the better and more intelligible plan will be to deal with both of them together, specifying, one by one, those classes of persons regarding whose **power to contract the law* [*211] contains any particular provisions, and pointing out, while treating upon each of them, in what cases they are disabled from entering into any contract, and

in what cases, although allowed to contract, they are obliged to do so in a particular form.

Now, I need hardly tell you that, *prima facie*, any subject of the realm has power to enter into any contract not rendered illegal by the provisions of the statute or common law; and, therefore, the cases to which I am now to advert are cases of complete or partial *disability*; cases in which a contract, which would have been good if entered into by an ordinary individual, is, when entered into by some particular individual, invalid, because that individual happens to fall within a class of persons who either do not possess *ability* to contract at all, or do not possess ability to contract in that particular way.

The first of these classes of persons to which I shall advert, is that of *Infants*.

The general principle which regulates this branch of the law is, that until an individual has attained the age of twenty-one, which period the law has selected as that at which a person of average capacity may fairly be supposed to have attained sufficient experience to render his natural faculties fully available in the practical business of the world, it is necessary to shield him from the dangers of becoming a prey to
 [*212] others willing to *take advantage of his inexperience; and as there are no means of doing this except by placing him under a limited disability to contract, he is accordingly placed under such limited disability. But, inasmuch as to place him under a *total* disability might have the effect of preventing him from attaining objects not only not detrimental but of the utmost advantage to him, he is, in order to avoid this risk, permitted to bind himself to a certain extent, since otherwise he might be unable to obtain food, clothes, or education, though certain to possess a

no very distant period the means of amply paying for them all.

The general principle therefore is, that an infant may bind himself by a contract for what the law considers *necessaries*, but not by any other contract. We will consider, therefore, what it is that the law comprises under this denomination.

Now, it is well established by the decisions that under the denomination *necessaries* fall not only the food, clothes, and lodging necessary to the actual support of life, but likewise means of education suitable to the infant's degree, and all those accommodations, conveniences, and even matters of taste, which the usages of society for the time being render proper and conformable to a person in the rank in which the infant moves. The question *what* is conformable, *what* is, in the legal sense of the word, *necessary*, is, in each case, to be decided by a jury; but these are the principles by *which the Judge ought to direct the jury [*213] that their decision should in each particular case be guided. It is impossible to understand this subject practically, so as to be able to say with tolerable certainty what would be the decision on this or that particular case, except by a familiarity with similar ones. I will therefore refer you to a number of decided cases, containing, in my judgment, the best illustrations of the matter.

The two cases of *Peters v. Fleming*,^(a) and *Harrison v. Fane*,^(b) in one of which the infant was held liable, and in the other not, appear to me to furnish good examples of the distinctions of which I am speaking.

In *Peters v. Fleming*, the plaintiff, who was a jeweller, brought an action of debt against an infant, who pleaded his infancy by way of defence: the plaintiff

(a) 6 M. & W. 42. (b) 1 M. & Gr. 550, E. C. L. R. vol. 39.

replied that the goods, for the price of which he sued were *necessaries* suitable to the estate, degree, and condition in life of the infant ; on which issue was joined and the question to be tried was, whether they were or were not so. It turned out that the infant was the oldest son of a member of Parliament, who was, also a gentleman of fortune, and that the infant was an undergraduate of the University of Cambridge, and resided at the University. The articles supplied were four rings, a gold watch-chain, and a pair of breast-pins

[*214] *The jury found that these articles were *necessaries*, and a motion was made to set aside the verdict as contrary to evidence. The Court of Exchequer, however, refused to interfere. Baron Parke said,—“ It is perfectly clear, that, from the earliest time down to the present, the word *necessaries* was not confined to such articles fit to maintain the particular person in the state, station, and degree of life in which he is ; and, therefore, we must not take the word ‘ *necessaries* ’ in its unqualified sense, but with the qualification above pointed out. The question therefore is whether there was any evidence to go to the jury that any of these articles were of that description. I think there are two that might fall under that description namely, the breast-pin and the watch-chain. The former might be a matter either of necessity or of ornament. The usefulness of the other might depend on this, whether the watch was necessary ? If it was, then the chain might become necessary itself. Now, it is impossible that a judge could withdraw from the consideration of a jury whether a watch was necessary for a young man at College, and of the age of eighteen or nineteen, to have. That being so, it is equally, as far as the chain is concerned, a question for the jury. There was therefore evidence to go to the jury. The

true rule I take to be this, that all such articles as are *purely* ornamental are not necessary, and are to be *rejected because they cannot be requisite for [*215] any one, and for such matters therefore an infant cannot be made responsible. But if they were not strictly of this description, then the question arises whether they were bought for the necessary use of the party, in order to support himself properly in the degree, state, and station of life in which he moved. If they were for such articles the infant may be made responsible."

On the other hand, in *Harrison v. Fane*, (c) an action was brought by a livery stable keeper for the hire of horses; the defendant pleaded infancy, and the plaintiff replied that the horses furnished were necessary for the infant, upon which issue was joined. It turned out on the trial that the defendant was the younger son of a gentleman who had once been a member of Parliament, and who had a family of five children. The defendant, the infant, kept a horse of his own, and sometimes hunted with his father's hounds. Under these circumstances the Judge who tried the cause thought that the horses were not necessities, and directed the jury accordingly; but the jury thought proper, nevertheless, to find their verdict for the plaintiff. The Court, considering it a perverse one, and contrary to law, set it aside, the L. C. J. observing, that he would not say that horses could not be necessities under any circumstances, but that no evidence *was [*216] given that they were so in the present case.¹

(c) 1 M. & Gr. 550, E. C. L. R. vol. 39.

¹ The result of the cases on both sides of the Atlantic seems to be, that unless the articles are, both as to quality and quantity, such as must be necessities to any one, the burden of proof lies on the plaintiff to show such a condition of life of the defendant as might raise to the rank of necessities, things which would otherwise be luxuries:

With regard to the L. C. Justice's remark, I feel no difficulty in putting a case in which a horse might be considered necessary. Suppose, for instance, the infant

Brooker v. Scott; Wharton v. M'Kenzie; Rainwater v. Durham, 2 Nott & M'Cord, 524; Rundle v. Keeler, 7 Watts, 239; Phelps v. Worcester, 11 New Hamp. 51; Bent v. Manning, 10 Vermont, 225; Grace v. Hale, 2 Humphreys, 27. When this has been shown, the question whether the articles *are* necessities is one for the jury, subject, however, in some cases, to the direction of the Court, as, for instance, as was said in Wharton v. M'Kenzie, *supra*, "Suppose the son of the richest man in the kingdom to have been supplied with diamonds and race-horses, the Judge ought to tell the jury that such articles cannot possibly be necessities." And it would also seem that the articles must be to supply *personal* wants either for the body or mind; expenditures, therefore, for other purposes, as, for example, for alterations in an infant's real estate, however requisite, can never be considered as necessities, they being regarded in the same light as articles furnished him for trade, the price of which cannot, as will be presently seen, be recovered as necessities, however beneficial they may be to the business. Tupper v. Cadwell, 13 Metcalf, 563. And even in cases where there can be no doubt that the articles are proper and necessary in themselves, yet as an overplus of goods, otherwise proper, ceases to be a supply of necessities as to the excess, the jury should be directed to find for no more than is absolutely necessary; unless there is evidence to justify the quantity. Johnson v. Lines, 6 Watts & Serg. 84.—R.

The board of an infant is included among the necessities, for which he may pledge his credit. Bradley v. Pratt, 23 Vermont, 378. Circumstances may exist which would render a home suitable to an infant's fortune and station in life. Aaron v. Harley, 6 Richardson, 26. An infant who has an allowance from the Court or any other source, of a sum sufficient to supply himself with necessities, suitable to his fortune and condition is not liable ordinarily for necessities supplied on credit. Rivers v. Gregg, 5 Richardson Eq. Rep. 274. Where it appears that a minor has been furnished with money enough to procure all necessities, the law presumes that he has been fully supplied, and the plaintiff must negative that presumption. And if it appears that he has been furnished at other places, at or about the same time, those who supplied him first have a prior right to be paid. Nicholson v. Wilborn, 13 Georgia, 467.

were a young man in a genteel station of life and had been ordered horse exercise by a medical attendant.

[Thus, in a case subsequently decided, *(d)* soda water, oranges, and jellies, for an infant undergraduate at college, were held, *primâ facie*, not to be necessities, though they might have been shown to have been so. "This," said Mr. Baron Parke, "is the case of a young man resident in the town, and having from his college everything necessary for a person in *statu pupillari*." Had there been evidence that his medical attendant recommended them, they would undoubtedly have been considered necessities. *(e)* The case of *Hands v. Slaney* *(f)* also well illustrates both these propositions, for in that case it was held that a captain in the army, under age, was liable for a livery, ordered by him for his servant, but not for cockades given to the soldiers of his company. Lord Kenyon thought it was proper for a gentleman in the defendant's situation to have a servant, and if proper to have a servant, that servant should have a livery, but the cockades could not be necessities. If the articles supplied to the [*217] infant are in their own nature necessities, considering the infant's degree and station, it is immaterial that he had such an allowance paid to him as might have enabled him to pay ready money for them. *(g)* Nor is it necessary for a tradesman, before supplying an infant with goods, to make inquiries as to the degree in which he is already supplied with goods of the like kind, *(h)* although, if the infant is fully and

(d) *Brooker v. Scott*, 11 M. & W. 67.

(e) *Wharton v. Mackenzie*, 5 Q. B. 606, E. C. L. R. vol. 48.

(f) 8 T. R. 578; *Coates v. Wilson*, 5 Esp. 152.

(g) *Burghart v. Hall*, 4 M. & W. 727.

(h) *Bragshaw v. Eaton*, 5 Bing. N. C. 231, E. C. L. R. vol. 35.

amply supplied, the goods furnished by the tradesman cannot be necessities, and, therefore, he supplies them at his peril.⁽ⁱ⁾

[It has always been considered that necessities for an infant's wife and children are necessities for himself,^(j)¹ a doctrine, which, together with that of an infant's liability generally, is so fully and clearly explained in the judgment of the Court of Exchequer, in the case of *Chapple v. Cooper*,^(k) that it deserves to be carefully studied. "It seems clear," said Mr. Baron Alderson, delivering the judgment of the Court, "that an infant can contract so as to bind himself in those cases where it is necessary for him to have the things for which he contracts; or where the contract is, at the time he makes it, plainly and unequivocally [*218] for his benefit. *It is with the former class that we are concerned. Things necessary are those without which an individual cannot reasonably exist. In the first place, food, raiment, lodging, and the like. About these there is no doubt. Again, as the proper cultivation of the mind is as expedient as the support of the body, instruction in art or trade, or intellectual, moral, and religious information may be a necessary also. Again, as man lives in society, the assistance and attendance of others may be a necessary to his well-being. Hence, attendance may be the subject of an infant's contract. Then the classes being established, the subject-matter and extent of the

(i) *Bainbridge v. Pickering*, 2 B. C. 1325.

(j) *Turner v. Trisley*, 1 Str. 168.

(k) 13 M. & W. 252.

¹ So, indeed, an infant marrying an adult wife becomes liable on her contracts whether for necessities or otherwise; for her contracts are valid, being made by an adult, and the husband's liability is an incident of the marriage contract, which is one that the law allows the infant to make. *Butler v. Breck*, 7 Met. 164; *Roach v. Quick*, 9 Wendell, 238.—R.

contract may vary according to the state and condition of the infant himself. His clothes may be fine or coarse, according to his rank; his education may vary according to the station he is to fill; and the medicines will depend on the illness with which he is afflicted, and the extent of his probable means when of age. So, again, the nature and extent of the attendance will depend on his position in society; and a servant in livery may be allowed to a rich infant, because such attendance is commonly appropriated to persons in his rank of life. But in all these cases it must first be made out that the class itself is one in which the things furnished are essential to the existence and reasonable advantage and comfort of the infant contractor. Thus, articles of *mere* luxury are always excluded, though luxurious articles *of utility are in some cases [219] allowed. So, contracts for charitable assistance to others, though highly to be praised, cannot be allowed to be binding, because they do not relate to his own personal advantage. In all cases there must be personal advantage from the contract derived to the infant himself. It is manifest, we think, that this principle alone would not be sufficient to decide the present case. For it would be difficult to say that there is any personal advantage necessarily derived to an infant from the mere burial of a deceased person. But there is another consideration which arises out of the circumstances of this case, which may, we think, materially affect the defendant's liability. This is the case of an infant widow, and the burial that of her husband, who has left no property to be administered. Now, the law permits an infant to make a valid contract of marriage; and all necessities furnished to one with whom he becomes one person by or through the contract of marriage, are, in point of law, necessities to the infant

himself. Thus, a contract for necessities to an infant's wife and lawful children is used by Lord Bacon as one of the illustrations of the maxim '*Persona conjuncta æquiparatur interesse proprio*.' (k) 'If a man,' says Lord Bacon, 'under the years of twenty-one contract for the nursing of his lawful child, this contract is [*220] good, and shall not be *avoided by infancy, no more than if he had contracted for his own aliments or erudition.' Now there are many authorities which lay it down that decent Christian burial is a part of a man's own rights; and we think it is no great extension of the rule, to say that it may be classed as a personal advantage, and reasonably necessary to him. His property, if he leaves any, is liable to be appropriated by his administrator to the performance of this proper ceremonial. If, then, this be so, the decent Christian burial of his wife and lawful children, who are the persons *conjunctæ* with him, is also a personal advantage, and reasonably necessary to him; and then the rule of law applies that he may make a binding contract for it. This seems to us to be a proper and legitimate consequence, from the proposition that the law allows an infant to make a valid contract of marriage. If this be correct, then an infant husband or parent may contract for the burial of his wife or lawful children; and then the question arises, whether an infant widow is in a similar situation. It may be said that she is not, because during the coverture she is incapable of contracting, and, after the death of the husband, the relation of marriage has ceased. But we think this is not so.

"In the case of the husband, the contract will be made after the death of the wife or child, and so after the relation which gives validity to the contract is at

(k) Bac. Law Maxims, r. 18; Broom's Maxims, 407, 2d edit.

an end to some purposes. But if the *husband [*221] can contract for this, it is because a contract for the burial of those who are *personæ conjunctæ* with him by reason of the marriage, is as a contract for his own personal benefit; and if that be so, we do not see why the contract for the burial of the husband should not be the same as a contract by the widow for her own personal benefit. Her coverture is at an end, and so she may contract; and her infancy is, for the above reasons, no defence, if the contract be for her personal benefit.

[“It may be observed, that as the ground of our decision arises out of the infant’s previous contract of marriage, it will not follow from it that an infant child or more distant relation would be responsible upon a contract for the burial of his parent or relative.”]

There are, however, some species ~~of~~ contracts which the law considers it so imprudent on the part of an infant to enter into, that it will not allow him to bind himself by them under any circumstances. For instance, an infant cannot *trade*, and consequently cannot bind himself by any contract having relation to trade. We know, by constant experience, that infants *do* in fact trade, and trade sometimes very extensively. However, there exists a conclusive presumption of law that no infant under the age of 21 has discretion enough for that purpose. You will see this laid down in *Whywell v. Champion*,^(l) *Dilk v. Keighly*.^(m) [He may, *therefore, recover back in an action for money had and received a sum which while an [*222] infant he had paid towards the purchase of a share in the defendant’s trade,⁽ⁿ⁾ not having actually received any profit or benefit from the business.^(o)] Some sin-

(l) Str. 1083.

(m) 2 Esp. 480.

(n) *Corpe v. Overton*, 10 Bing. 252, E. C. L. R. vol. 25.

(o) *Holmes v. Blogg*, 8 Taunt. 508, E. C. L. R. vol. 4.

gular consequences follow from this general rule : for instance, a bill of exchange is a mercantile contract deriving, as I had occasion to explain in the last Lecture, its peculiar and distinguishing qualities from the law merchant. An infant, therefore, as *he* cannot be a merchant, in the eye of the law, is not allowed to bind himself by becoming a party to such an instrument : and thus, although a young man under the age of 21 may bind himself by a contract to pay money for his necessary dress, living, or education, yet, if he accept a bill for the price of these very articles, it will not bind him ; although by accepting the bill he, in fact, would rather gain an advantage, inasmuch as he would be entitled to credit during the time the bill had to run.(p)¹

(p) Williams v. Harrison, Carth. 160 ; Williamson v. Watts, 1 Camp. 552 ; Harrison v. Cotgrave, 16 L. J. (C. P.) 198.

¹ Although in Ayliffe v. Archdale, Cro. Eliz. 920, a distinction was taken between a bond with a *penalty*, given for necessities, and an obligation for the exact sum, yet it has been since repeatedly held that an infant is neither liable upon a bond, bill, or note, given for necessities, nor upon an agreement to pay a certain sum for them, on the ground that the infant is not to be precluded by the form of the contract, from his right of showing the actual worth of the articles Earle v. Peale, Salk. 386, pl. 2 ; Probhart v. Knonth, 2 Esp. 472 Beeler v. Young, 1 Bibb. 519 ; M'Crillis v. Howe, 3 New Hamp. 348 or, as it should be more correctly said, because the only contract on which an infant is liable, is the *implied* contract for necessities Roof v. Stafford, 7 Cowen, 182 ; note to Tucker v. Moreland, *supra* Nor is he liable for money lent to enable him to procure necessities on the ground that the contract arises upon the lending ; and the subsequent application of the money for necessities, cannot, by matter thus *ex post facto*, make the contract binding. Earle v. Peale ; Walker v. Simpson, 7 Watts & Serg. 88. In equity, however, it is considered that where the money is thus actually applied, the lender may stand in the place of the infant's creditor, who has been satisfied, and be subrogated to his rights : Marlow v. Pitfield, 1 P. Wms. 559 ; Beeler v. Young, Walker v. Simpson, *supra* ; Best v. Manning, 10 Vern.

Again, he cannot bind himself by stating an account; although the items of the account be all re-

230, and, at law, money *paid* at the infant's request for necessities, may be recovered under a count for money paid: *Randell v. Sweet*, 1 Denio, 460; *Coun v. Coburn*, 7 New Hamp. 368; or, it was held, in *Smith v. Oliphant*, 2 Sand. S. C. R. 306, under a count for money lent and advanced.

But although a recovery may not be had upon a note given by an infant for necessities, yet the mere fact of the note having been given, will not of course preclude the plaintiff from recovering the value of the necessities which formed its consideration: *Earle v. Reed*, 10 Metcalf, 387, *M'Crillis v. Howe*, 3 New Hamp. 348; *M'Minn v. Richmonds*, 6 Yerger, 9.

The first of these cases, however, went somewhat further. The plaintiff's declaration contained a count on a promissory note given by an infant, and a count for goods sold and delivered. The plaintiff gave the note in evidence, and proved the sale, delivery, and value of the necessities which formed its consideration. The remedy on the original contract was, however, barred by the Statute of Limitations, but a local statute in Massachusetts prevents, to some extent, the bar of the limitation act, in cases of notes attested by a witness and sued by the original payee, which was the case in this instance. Under these circumstances, it was contended on behalf of the defendant, that he was not originally liable on the note, under the principles just stated,—that never having ratified it, it was voidable, and useless therefore in that action for any purpose,—and that the plaintiff, when thrown back to the consideration of the note, could not recover by reason of the lapse of time. The Court, however, held that, as a general principle, there was nothing to prevent an infant's liability on an express, as well as on an implied contract for necessities, provided the consideration were always left open for proof as to reasonableness of amount, &c., and the Court saw no reason why the statute referred to, should not apply to the case of a note given by a minor, as well as in the case of an adult. The previous case of *Stone v. Dennison*, 13 Pick. 1, had also taken the ground that an infant could be liable on a special contract for necessities, in every case where the consideration was thus subject to proof, and it was said that a contrary rule might subject the infant to hardship in cases where, by the terms of the contract, the price of the necessities was less than could be recovered on a *quantum valebat*. It has, however, been observed of the first of these cases (by Mr. Wallace, in the note to *Tucker v. More-*

coverable against him as for necessities.(q) [In [*223] *deed, in many instances, the statement of an account often requires so very large a share of that kind of knowledge which is derived from actual experience alone, that there are perhaps few transactions for which the young commonly are less prepared ; he cannot bind himself, therefore, by stating an account. For a similar reason an infant is not bound by an agreement to refer a dispute to arbitration,(r) nor can he render himself liable by borrowing, even to lay out upon necessities the money borrowed.(s)]

[In *Oliver v. Woodroffe*, just cited, the infant had given a *cognovit* (which as you are no doubt aware is an acknowledgment by a defendant that an action brought against him is rightly brought, and that a named sum is due to the plaintiff), and it was admitted that it was given for necessities supplied to the infant. It was argued, that, as an action might have been brought against him for the necessities, he ought to be allowed to confess that action in order to save further expense. But the Court of Exchequer, after considering the point, held that the *cognovit* could not be enforced against the infant, because by that means a minor would be made to state an account, which the law will not allow him to do, so as to bind himself.

(q) *Trueman v. Hurst*, 1 T. R. 40 ; *Ingledeu v. Douglass*, 2 Stark. 36, E. C. L. R. vol. 3 ; *Oliver v. Woodroffe*, 4 M. & W. 650 ; *Williams v. Moor*, 11 M. & W. 256.

(r) *Watson on Accords*, cap. 3, sect. 1.

(s) *Earle v. Peale*, 1 Salk. 387 ; *Probart v. Knouth*, 2 Esp. 472.

land, *supra*), that it is "inconsistent with principle, as, in a count on a special and express contract, all or none should be recovered ;" and it may be remarked of the reason given in *Stone v. Dennison*, that the general rules of law as to infants are made for their protection, and lose their application when their reason ceases. *Jefford's Adm. v. Ringgold*, 6 Alabama, 584.—R.

If an action be brought against him, it is for the *jury to determine the reasonableness of the [*224] demand.]

This rule that an infant shall not be allowed to bind himself by contracts made in trade, although, looking at it with regard to the present state of education and society, it may appear not to be so requisite as once it was, yet, looking at it upon general principles, it is capable of being defended by some strong arguments. The consequences of failure in trade are so fatal, not merely to the property, but often to the reputation of the unsuccessful trader,—and a failing trader is so often, in his struggles to save himself from utter shipwreck, and to keep up a good appearance in the sight of the world, induced to have recourse to disingenuous and reprehensible expedients,—that possibly, upon reflection, it may be thought not unwise to guard young persons up to a certain point against the accidents and temptations of mercantile speculation, and to insure to them, as far as possible, the advantage of starting fair in life with fortunes unimpaired and characters unblemished. How grievous would be the situation of a young person beginning life at one-and-twenty an uncertificated bankrupt. Against such a chance, the law as it now stands effectually guards him; for, as an infant cannot trade, he cannot become bankrupt; and it has been decided that a fiat against him is void.^(t) Again, *the general principle being, [*225] that an infant shall be bound by no contract which is not beneficial to him,^(u) it is held that he can engage in none in which the performance of the contract is secured by a penalty; for that it cannot be for his advantage to become subject to a penalty; and,

(t) *Belton v. Hodges*, 9 Bing. 365, E. C. L. R. vol. 23.

(u) See *Stikeman v. Dawson*, 16 L. J. (Chanc.) 205.

therefore, though the old books lay it down that may bind himself by a deed to pay for necessaries, yet it is clearly settled that he cannot do so by a bond containing a penalty. (y) A variety of other examples might be given ; but I think what I have said suffices to explain the general nature of an infant's liability and exemption from liability.

Now, therefore, the general rule being that an infant cannot bind himself except for necessaries, next comes the question—Suppose he do, in fact, enter into a contract for something not falling under that denomination, what will be the consequence? In the first place, no action can be maintained against him during his infancy upon any such contract, nor afterwards unless he elect to confirm it. But, in the second place, the contract is not absolutely *void* but voidable, and, therefore, when he arrives at the age of twenty-one, he may confirm it, and, if he do so, he will come liable to an action upon it.¹

I will exemplify this by the case of Goode [*226] *Harrison, which I have already cited. (z) A person of the name of Goode entered into a trading partnership with an infant under the age of twenty-one, called Bennion ; a third person, named Harrison supplied them with goods, and after Bennion came of age, he took no step to signify to the two that he disclaimed the connection with Goode, but,

(x) Com. Dig. Infant, B. 5.

(y) Ayliff v. Archdale, Cro. Eliz. 920 ; Corpe v. Overton, 10 B. 252, E. C. L. R. vol. 25.

(z) 5 B. & Ald. 147, E. C. L. R. vol. 7.

¹ As to contracts of infants being only voidable and not void, Strain v. Wright, 7 Georgia, 568 ; Slocum v. Hooker, 13 Barb. 536 ; Levering v. Heighe, 2 Maryland Ch. Decis. 81 ; West v. Per 16 Alabama, 186 ; Ridgeley v. Crandall, 4 Maryland, 435 ; Cummi v. Powell, 8 Texas, 80 ; Ferguson v. Bell, 17 Missouri, 347.

the contrary, allowed it to be supposed, that he was still in partnership with him. After this, Harrison supplied Goode with more articles, and brought an action against him for the price, jointly with Bennion, as a co-defendant. Bennion set up his infancy, and urged that, as an infant cannot bind himself by a contract made in the course of trade, his agreement while under age, to become Goode's partner was not binding upon him, and consequently, that, not being Goode's partner, he was not liable for the articles supplied to him. On the other hand it was urged, that, admitting the partnership contracted while he was an infant to be voidable, it was nevertheless in his option, when he arrived at his full age of one-and-twenty, to adopt and confirm it; that by his conduct he had done so; and that consequently he was liable for the goods supplied afterwards. The question was argued, as you may suppose, with great ability, the counsel being Mr. Baron Parke and the late Mr. Justice Littledale. The Court decided in favor of *the plaintiff. The principle is clearly and strictly laid down in [*227] the judgment of Mr. Justice Bayley.—“It is clear,” says his Lordship, “that an infant may be in partnership. It is true that he is not liable for contracts entered into during his infancy: but still he may be a partner. If he is in point of fact a partner during his infancy, he may, when he comes of age, elect, whether he will continue that partnership or not. If he continues the partnership, he will then be liable as a partner.¹ If he dissolve the partnership, and if when

¹ A question may here arise as to the extent of the liability for the previous debts of the firm, and in *Miller v. Sims*, 2 Hill (S. C.), 479, it was held, that inasmuch as in general one partner could bind the firm by contracts made without the knowledge of the other, to say that one may enter into or affirm a partnership without incurring these

of age he take the proper means to let the world know that the partnership is dissolved, then he will cease to be a partner."

It is easy to apply this mode of reasoning to any other sort of contract. (a) [Thus, if he makes a lease of his land, which is binding if for his benefit but not otherwise, and after majority accepts rent, and performs other acts affirms the contract, this is strong evidence that the lease is beneficial and binding; (b) or if an infant lessee remains in possession of the house and land demised, and pays rent after majority, he cannot repudiate it afterwards, but it is confirmed from the beginning. (c) This head of law has been much more elaborately considered in several recent cases, in which [*228] the liability of an infant *holder of railway shares to pay the calls upon them has been brought in dispute. The arguments and judgments in these cases (which are cited below), demand a very careful perusal, and will amply repay it in the very full view which they give of the principle now under discussion and the application of it. Assuming, according to the opinion of the Court of Exchequer, that the question of the infant's liability does not depend conjointly upon the Act creating the company, and upon

(a) *Southerton v. Whitlock*, 1 Str. 690.

(b) *Shep. Touch.* 268; *Ashfield v. Ashfield*, Sir W. Jones, 11

(c) *Ketsey's case*, Cro. Jac. 320; *Holmes v. Blogg*, 8 Taunt. E. C. L. R. vol. 4.

liabilities, would be to say that one may affirm a contract of partnership and disaffirm that which is inseparably incident to it, and the defendant, who had, by his acts of receiving partnership funds, &c., affirmed a partnership, begun while he was yet an infant, was therefore liable on a note given by the other partner, before such affirmation of which he had no knowledge, and which he refused to pay when formed of it. A decision, apparently to the contrary, in *Crabtree May*, 1 B. Monroe, 289, will, on examination, be found to have turned on the insufficiency of the replication.—R.

Companies Consolidation Act, 8 & 9 Vict. c. 16, but upon the Common Law, it has been repeatedly decided, that, where an infant becomes the holder of shares by his own contract and subscription, he is *prima facie* liable to pay the calls, (d) he may repudiate that contract and subscription, and if he does so while an infant, although he may on arriving at full age disaffirm his repudiation, or receive the profits, it is for those who insist upon his liability to make out these facts. (e) Infants having become shareholders in railway companies, have been held liable to pay calls. "They are purchasers," (said the Court of Exchequer in the *London and North Western Railway Company v. M'Michael*), "who have acquired an interest not in a mere chattel, but in a subject of a permanent nature, either by contract with the *Company [*229] or by devolution, from those who have so contracted, and without an obligation attached to it which they are bound to discharge, and have been thereby placed in a situation analogous to an infant purchaser of real estate, who has taken possession, and thereby become liable to all the obligations attached to the estate, for instance, to pay rent in case of a lease rendering rent, or to pay a fine due on admission in the case of copyhold, to which an infant had been admitted, (f) unless they have elected to waive or disagree to the purchase altogether, either during infancy or after full age, at either of which times it is equally competent for an infant so to do." Thus, where the infant avoids the contract for purchase during mino-

(d) *London and North Western Ry. Co. v. M'Michael*, 20 L. J. (Exch.) 97; 5 Ex. 114. See *Cork and Bandon Ry. Co. v. Cazenove*, 10 Q. B. 735, E. C. L. R. vol. 59.

(e) *Newry and Enniskillen Ry. Co. v. Coombe*, 3 Exch. 365.

(f) *Evelyn v. Chichester*, 3 Burr. 1717.

rity, he is not liable to pay the calls, and where there has been no waiver or repudiation he continues liable. If, after full age, the party repudiates a contract made during his infancy, it may be gathered from what has been said, and indeed hardly requires stating that he must do so within a reasonable time after he comes of age.^(g)] However, in order to prevent persons from inconsiderately confirming contracts made by them during infancy, and to obviate the danger of attempts to foist such confirmation on them by false evidence, it is enacted, by 9 Geo. 4, c. 14, s. 5, that

[*230] action shall be maintained whereby to charge any person upon any promise made, after full age, to pay any debt contracted during infancy, upon any ratification after full age of any promise in a simple contract made during infancy, unless such promise or ratification shall be made, by some *written* instrument signed by the party to be charged therewith.

(g) *Dublin and Wicklow Ry. Co. v. Black*, 22 L. J. (Exch.) 8 Ex. 181, S. C.

(h) See *Hartley v. Wharton*, 11 A. & E. 934, E. C. L. R. vol. 1; *Hunt v. Massey*, 5 B. & Ad. 902, E. C. L. R. vol. 27; *Hyde v. Johnson*, 2 N. C. 778.

¹ It has been seen in a former part of these Lectures, that any acknowledgment, not inconsistent with a promise to pay, such as a partial payment, will be sufficient to remove the bar of the Statute of Limitations. It is not so, however, with respect to the ratification of contracts made during infancy. There must either be a direct affirmation (as in the case cited, *supra*, by continuing the business, or, in the case of a chattel, by retention of the possession, selling it again, or like: see *Lawson v. Lovejoy*, 8 Greenleaf, 405; *Aldrich v. Griest*, 10 New Hampshire, 194; *Kline v. Beebe*, 6 Connecticut, 494; *Boyd v. Boyden*, 9 Metcalf, 519; *Thomasson v. Boyd*, 13 Alabama, 4; *Merreweather v. Herran*, 7 B. Monroe, 162); or an express promise to pay, made voluntarily, with full knowledge of the liability thus incurred, made to the party himself or his agent, and not to a

[There is some difficulty, in cases like the present, in understanding clearly what is meant by a ratification. It is generally, as was remarked by Lord Ellenborough, in *Cohen v. Armstrong*,⁽ⁱ⁾ more correct to say that the infant made a new promise after he came of age. To say that he ratified it, is an artificial inference from the fact. It is not a ratification, unless done *animo ratificandi*, whereas it is in general only a new promise to pay. But, whatever difficulty may exist, the law clearly recognizes ratification as something distinct from a new promise. Indeed, Lord Tenterden's Act, 9 Geo. 4, c. 14, s. 5, as observed by the Court of Exchequer, "makes a distinction between a new promise and the ratification, after majority, of the old promise made during infancy, in both cases requiring a written instrument signed by the party. The first step, therefore, to take towards a decision of questions on this part of the subject, is to understand clearly what is meant by a ratification, as *distinct- [*231] guished from a new promise. We are of opinion, that any act or declaration which recognizes the existence of a promise as binding, is a ratification of it; as in the case of agency, anything which recognizes as binding an act done by an agent or by a party who has acted as agent, is an adoption of it. Any written instrument signed by the party which in the case of adults would have amounted to adoption

(i) 1 M. & Sel. 724.

stranger having no interest : *Hinely v. Margaritz*, 3 Barn. 428 ; *Ford v. Phillips*, 1 Pick. 202 ; *Pierce v. Tobey*, 5 Met. 168 ; *Hale v. Gerish*, 5 N. Hampshire, 374 ; *Millard v. Hewlett*, 19 Wendell, 301 ; *Wilcox v. Roath*, 12 Conn. 551 ; a mere acknowledgment or partial payment will not suffice : *Goodsell v. Myers*, 3 Wendell, 481 ; *Robbins v. Eaton*, 10 N. Hamp. 561 ; *Hinely v. Margaritz*, *supra* ; for the law will imply no promise in the case of an infant, as has been seen, except for necessities.—R.

of the act of a party acting as agent, will in the case of an infant who has attained his majority, amount to a ratification." (*k*)¹

Now, then, such being the effect of an infant's contracts with regard to the infant himself, it remains only to say a word or two as to their effect on the other contracting party. And, as to him, the rule is that *he is bound though the infant is not*; for, to use the words in which the rule is stated in Bacon's Abridgement "Infancy," I, 4,—“Infancy is a personal privilege which no one can take advantage but the infant himself; and, therefore, though the contract of the infant be voidable, yet it shall bind the person of full age for, being an indulgence which the law allows infants to secure them from the fraud and imposition of others it can only be intended for their benefit, and is not to be extended to persons of the years of discretion, who are presumed to act with sufficient caution and security. And, were it otherwise, this privilege instead of being an advantage to the infant would in many cases turn greatly to his detriment. Thus, for instance, in *Holt v. Ward*, (*l*) a gentleman of full age promised to marry a minor. It was decided that she might maintain an action against him for breach of promise, though he could not have done so had she refused to perform her side of the contract.² Again, (*m*) an infant was allowed

(*k*) Judgment of Court in *Harris v. Wall*, 1 Exch. 122.

(*l*) 2 Str. 937. (*m*) *Warwick v. Bruce*, 2 M. & Sel. 205.

¹ As to what will amount to a ratification: *West v. Penny*, 16 Alabama, 186; *Levering v. Heighe*, 2 Maryland Ch. Decis. 81; *Villiams v. Mabee*, 3 Halsted Ch. Rep. 500.

² The case was four times argued: see the report in *Fitzgibbon* 175, 275; and the decision was recognized by Lord Hardwicke in *Harvey v. Ashley*, 3 Atkins, 610, and on this side of the Atlantic

maintain an action on a contract to purchase a crop, on which no action could have been maintained against him.¹

I now come to the second class of persons on whose capacity to contract I think it necessary to observe. I mean that of *married women*.

Now a contract by or with a married woman is one of two sorts: it is either a contract which she entered into *before* her marriage, and which continued in exist-

the decisions in *Hunt v. Peake*, 5 Cowen, 475; *Willard v. Stone*, 7 Id. 22, and *Carman v. Ashbury*, 1 Marshall, 78, were based on its authority.—R.

¹ But liberal as is the law towards infants, it does not allow them to retain the possession of property, and still repudiate the contract by which that possession has been obtained; and as by the avoidance of the contract the property reverts in the vendor, the latter may bring trover, replevin, or detinue: *Mills v. Graham*, 4 Bos. & Pul. 140; *Badger v. Phinney*, 15 Mass. 359; *Boyden v. Boyden*, 9 Met. 519; *Jefford v. Ringgold*, 6 Alab. 544. And so with respect to real estate; he cannot disaffirm securities given for the purchase money, and still claim the land under his deed: *Weed v. Beebe*, 21 Vermont, 495. If, however, the goods have been wasted, sold, or otherwise disposed of by the infant, after the coming of age, these acts, as we have seen, amount to an affirmation of the contract, and he will then, the bar of infancy being thus removed, be liable upon the contract; but if the goods have been wasted or sold during infancy, neither trover nor detinue will lie, for a refusal after age to deliver, when he has not the goods, is no conversion: *Fitts v. Hall*, 9 New Hamp. 441; *Boody v. M'Kenney*, 23 Maine, 517; and detinue does not lie where the goods have been parted with in a manner authorized by law: *Pool v. Adkisson*, 1 Dana, 110.

Upon the subject of an infant's liability for torts, the manner in which he is made a party to an action, and many other important branches of this subject, the student is again referred to the note to *Tucker v. Moreland*, 1 Amer. Lead. Cas.—R.

An infant cannot rescind a contract, and bring an action to recover the value of the property parted with, without restoring to the other party the value with which he parted. *Bailey v. Barnberger*, 11 B. Monroe, 113; *Womack v. Womack*, 8 Texas, 397.

ence afterwards; or it is a contract which she enters into subsequently to her marriage.

Now with regard to the former description of contracts, I will dispose of them in a few words. Upon the marriage, the benefit of, and the liability to, the wife's contracts made before marriage, vest in the husband, and continue vested in him during the continuance of the marriage.⁽ⁿ⁾ If she die **before* they are enforced, and he survives her, he is entitled to the benefit of such contracts, not in his own right, but as her administrator;^(o)¹ and is liable to be sued on them, not in his individual capacity, but as his wife's administrator. [Thus in an action on a promissory note, brought by the administrator of Ann Hart, it was proved that it was made by the defendant and delivered by him to Ann Hart who was then *feme sole*, but who afterwards married William Ha-

⁽ⁿ⁾ *Mitchinson v. Hewson*, 7 T. R. 348; Com. Dig. tit. "Bar and Feme," E. 3. See *Milner v. Milner*, 3 T. R. 627; Sel. N. 307, 11th ed.

^(o) *Betts v. Kimpton*, 2 B. & Ad. 273, E. C. L. R. vol. 22.

¹ *Collins v. Hoxie*, 9 Paige, 81; *Hunter v. Hallett*, 1 Edwards Ch. 388; *Coleman v. Waples*, 1 Harrington, 196. So that if the husband die without having taken out letters of administration, the administrator cannot recover her choses in action, but administration must be taken out to the wife: *Betts v. Kimpton*, 2 Barn & Adolp 273, 22 E. C. L. R.; and Lord Tenterden well observes in that case that the question is not who is actually entitled to the property, but who has the right to sue for it; for although the latter right is vested in the representative of the wife alone, yet he is considered in equity as a trustee for the representative of the husband: *Squibb v. Wyn*, 1 P. Wms. 368; *Stewart v. Stewart*, 7 Johns. Ch. R. 22. If, however, the husband has taken out letters of administration of his wife's estate, and die before its full administration, his representative is, in the absence of any statutory enactment, entitled to a administration *de bonis non*. *Donnington v. Mitchell*, 1 Green's C. R. 346.—R.

not her administrator and died intestate in his lifetime. The Court held that the note clearly did not become the property of William Hart, but passed to the plaintiff as her administrator; and that the husband, not having obtained administration to his wife, had no interest in the note.(p)] If she survive him, her right to the benefit of, and her liability upon, such contracts revives, assuming always that nothing has been done to put an end to the contract during the continuance of the marriage.(q)¹ With respect to

(p) Hart v. Stephens, 6 Q. B. 937, E. C. L. R. vol. 51.

(q) Rumsey v. George, 1 M. & Sel. 180; Fitzgerald v. Fitzgerald, 8 C. B. 592, E. C. L. R. vol. 65.

¹ Blount v. Besland, 5 Vesey, 315; Schuyler v. Hoyle, 5 Johns. Ch. 196; Hayward v. Hayward, 20 Pick. 517; Strong v. Smith, 1 Met. 476; Weeks v. Weeks, 5 Iredell's Eq. R. 111, where the previous cases in North Carolina are noticed. The result of these principles, then, briefly is, that for all the debts of the wife contracted before marriage, no matter how improvident they may be, the husband is personally liable during the coverture, and no longer, and this, though he may not have received a cent by her; and, on the other hand, upon her death, his personal liability for her debts contracted before marriage is wholly wiped out, though he may have received a fortune by her. The apparent injustice of this latter rule, than which nothing is better settled (Tabb v. Boyd, 4 Call, 453; Buckner v. Smyth, 4 Desaussure, 371; Witherspoon v. Dubose, 1 Bailey's Ch. R. 166), has often been strongly urged, and equity been invoked to modify it, and Lord Nottingham is reported to have said with some earnestness that "he would alter the law on that point" (Freeman v. Goodham, Ch. R. 295); but in Heard v. Stamford, Cas. temp. Talbot, S. C. 3 P. Wms. 411, the Chancellor said, "It is extremely clear that by law the husband is liable for the wife's debts only during the coverture, unless the creditor recovers judgment against him in the wife's lifetime, and I do not see how anything less than an act of Parliament can alter the law. If I relieve against the husband because he had sufficient assets with his wife wherewith to satisfy the demand in question, by the same reason where a *feme* indebted *dum sola*, marries, bringing no fortune to her husband, and judgment is recovered against the husband, after which the wife dies, I ought to

debts due to the wife *dum sola*, the husband, says Lord Ellenborough, "is her irrevocable attorney, if I may so say; and if he reduce them into possession during the coverture, they become his debt, but until that is done they remain the debt of the wife; and all the [*234] cases agree that in the event of his *death they would survive to her." The Court, therefore, held that the husband alone could not be petitioning creditor upon the bankruptcy of a debtor of his wife, who became such before her marriage. And the Court of Exchequer has, upon the same ground of survivorship in the wife, decided that if the husband become bankrupt, his assignees cannot sue in their own names alone upon a promissory note given to the wife before marriage. (r)¹

During the marriage the husband may, as I have said, sue or be sued upon his wife's contracts, made while she was a single woman; but if he sue he must join her as a co-plaintiff; and, if he be sued, she must be joined as a co-defendant. (s)²

(r) Sherrington v. Yates, 12 M. & W. 855.

(s) Rumsey v. George, 1 M. & Sel. 180; Milner v. Milner, 3 T. R. 631; Pittam v. Foster, 1 B. & C. 248, E. C. L. R. vol. 8.

grant relief to the husband against such judgment, which yet is no in my power, consequently there can be no ground for a court of equity to interpose in the present case; and if the law, as it now stands, be thought inconvenient, it will be a good reason for the legislature to alter it, but till that is done, what is law at present must take place.' See to the same effect the remarks of Lord Redesdale, while Chancellor of Ireland, in *Adair v. Shaw*, 2 Schoales & Lefroy, 263.—R.

¹ *Shay v. Sessamen*, 10 Barr, 432; *Eshelman v. Sherman*, 1 Harris, 563.—R.

² And this even although the husband make a subsequent promise unless, of course, such promise be based upon a new consideration or benefit to himself, or inconvenience to the creditor. *Waul v. Kirkman* 13 Smedes & Marsh. (Miss.) 599.—R.

Such is shortly the state of the law regarding the effect of marriage on the contracts made by the wife while single. There is one case, indeed, in which the husband may sue upon a contract made with her while single, without joining her as a co-plaintiff. This is where a bill of exchange or promissory note has been given to her; in which case [his suing upon it in his own name is an election to take it to himself and a dissent to his wife's having any interest in it, an election which, as will be seen hereafter, a husband has with respect to his wife's choses in action, and which the peculiar nature *of a promissory note [*235] enables him to make, by merely suing on it. For the wife could not, after marriage, indorse the note, and it would be nugatory for the husband to indorse to himself. But he may, if he pleases, leave it as it is, and then the remedy on it survives to the wife.(t)]¹

Next as to contracts entered into by a married woman subsequently to her marriage. It is a general rule, that a married woman cannot bind herself by any con-

(t) *Gaters v. Madeley*, 6 M. & W. 423. See *M'Neillage v. Holloway*, 1 B. & Ald. 218; *Howard v. Oakes*, 2 Exch. 136.

¹ But this decision of Lord Ellenborough has been overruled, and it is now settled that a promissory note is, in the ordinary course of things, a chose in action, and there is nothing to take it out of the common rule that choses in action survive to the wife after the death of her husband, unless he has reduced them into possession; and it is believed to be a rule without exception that a husband can *not* sue alone to recover any chose in action belonging to the wife *before* marriage: *Fenner v. Plasket*, Moore, 422; *Richards v. Richards*, 2 Barn. & Adolph. 447, 22 E. C. L. R.; *Gates v. Maddely*, 6 Mees. & Wels. 427; *Sherrington v. Yates*, 12 Id. 855; *Hart v. Stephens*, 6 Queen's Bench, 937, 51 E. C. L. R.; *Morse v. Earl*, 13 Wendell, 271; *Clapp v. Stoughton*, 10 Pickering, 470; *Johnston v. Pastern*, Cam. & Nor. (N. Car.) 464.—R.

tract made during the coverture ; not, as in the case of an infant, from any presumption of incapacity, but because she has no separate existence, her husband and she being in contemplation of law, but one person. The great case on this subject is *Marshall v. Rutton*,^(u) which was decided by all the Judges in England except Mr. J. Buller, and is one of the last, perhaps the very last instance of the practice which was so common in the early ages of the law, and according to which any one of the superior Courts before which a very important point arose, requested the assistance of the Judges of the other two, to hear it discussed, and to assist in deciding it. [That she cannot bind herself by any contract made during her coverture, has been decided in a case where she was separated from her husband, and had a separate maintenance, which was [*236] a fact *in the case of *Marshall v. Rutton*; or where she was living in open adultery, although the contract was for goods sold to her, and the vendor knew not of her marriage.^(y) Even if she had been divorced a mensâ et thoro (which, you no doubt know, merely legalizes the separation of the parties, but leaves the marriage bond still unsevered), the same rule applies.^(z) Her husband being a foreigner residing abroad, is not a sufficient circumstance to make her liable;^(a) nor will his having been a bankrupt who had absconded from his creditors, and was residing abroad when the contract was made, render her liable to be sued upon it.^(b)]

(u) 8 T. R. 545; *Lewis v. Lee*, 3 B. & C. 291, E. C. L. R. vol. 10

(y) *Meyer v. Haworth*, 8 A. & E. 467, E. C. L. R. vol. 35.

(z) *Faithorne v. Lee*, 6 M. & Sel. 73; *Lewis v. Lee*, 3 B. & C. 291 E. C. L. R. vol. 10.

(a) *Shelton v. Busnach*, 1 Bing. N. C. 139, E. C. L. R. vol. 27.

(b) *Williamson v. Dawes*, 9 M. & W. 292.

In a word, the person who contracts with a married woman, as far as any right in a court of law is concerned, relies upon her bare word; for she is not recognized there as a person capable of binding herself by any contract whatever,¹ save only in one or two excepted cases, which I will now specify.

The first of these is where her husband is civilly dead: for instance, where he is under sentence of transportation. In such a case, to prevent her from contracting, would be to deprive her too of all civil rights, since the husband, being civilly *dead, is no longer capable of contracting for her. (c) This [*237] is a very old doctrine, having been first established in the 2d Hen. 4. In the Year Book of which year we find that Belknap the Lord High Treasurer was banished to Gascony till he should obtain the King's favor, and his wife, Lady Belknap, brought an action in the Common Pleas, which seems to have been the first instance of such a proceeding by a married woman; for it struck the lawyers of those days with so much

(c) Ex parte Franks, 7 Bing. 762, E. C. L. R. vol. 20; Marsh v. Hutchinson, 2 B. & P. 231.

¹ While it is correct, that a married woman cannot, by a contract made during coverture, bind *herself*, yet the *husband* may be bound by contracts made by her, in cases where it appears that she acted as his agent, or under an authority from him, express or implied.

It is well settled that a married woman cannot bind herself to answer in damages by reason of her joining with her husband in covenants in a deed conveying her estate, but it seems not to be exactly determined whether these covenants will have any effect upon her by way of estoppel, such an effect having been recognized in some cases: *Hill's Lessee v. West*, 8 Ohio, 226; *Marvie v. Sebastian*, 4 Bibb. 436; *Fowler v. Shearer*, 7 Mass. 21; *Nash v. Spofford*, 10 Metc. 192; and denied in others: *Jackson v. Vanderheyden*, 17 Johns. 167; *Carpenter v. Schermerhorn*, 2 Barb. Ch. 314; *Wadleigh v. Glines*, 6 N. Hamp. 18; *Den v. Desmarest*, 1 Zabriskie, 541.—R.

surprise that they commemorated it by a Latin distich, which Lord Coke has thought it worth his while to preserve in the 1st Institute. It is in the old monkish style, and is not only in hexameter measure, but in rhyme also, the words are

“ Ecce modo mirum, quod fœmina fert breve Regis,
Non nominando virum conjunctum robore legis.”

Another case is where the husband is a foreigner belonging to a country at war with Great Britain. In such case, as he cannot lawfully contract or sue in England, it seems to be admitted that his wife may do so as if she were unmarried. (*d*)¹

(*d*) *Barden v. Keverberg*, 2 M. & W. 61.

¹ *Derry v. Duchess of Mazarine*, 1 Raym. 147. This exception, however, to the general rule which denies the efficacy of the contracts of married women, is not confined merely to the case of the wife of an *alien enemy*, nor indeed, as it would seem by the late authorities, at least in this country, to the case of an alien at all. Some distinctions were at one time taken, which have not latterly been recognized. Thus it has been held, that where the husband was a foreigner, and had never been in the country, the wife could sue and be sued on her contracts: *Walford v. Duchess of Pienne*, 2 Esp. 554; *De Gallion v. L'Aigle*, 1 Bos. & Pull. 357; *Gregory v. Paul*, 15 Mass. 30; *Robinson v. Reynolds*, 1 Aiken, 174; but not where the husband had ever resided in the country: *Kay v. Duchess of Pienne*, 3 Camp. 123; or was a natural born subject, though he might have deserted her and resided abroad for years: *De Gallion v. L'Aigle*, *Boggett v. Frier*, 11 East, 301; *Franks v. Duchess of Pienne*, 2 Esp. 587. The distinction thus taken between an alien and a subject, seems to have proceeded on the supposition that in the case of the latter, there might be an *animus revertendi*, but the later cases have judiciously neglected such a distinction, and it is now well settled, at least in this country, that where the wife has been left by her husband—has traded as a feme sole—and has obtained credit as such, she is liable for her debts, and on the other hand may acquire property of her own: *Rhea v. Rheuner*, 1 Peters, 105; *Bean v. Moyan*, 4 M'Cord, 148; *Starret v. Wynn*, 17 Serg. & Rawle, 133; *Gregory v. Pierce*, 4 Metcalf, 478;

By the custom of the city of London, a married woman is allowed to be a trader in her individual capacity, and may sue alone in the city courts on contracts made by her in the course of such trade; [*238] *but it would seem that, even in this case, if she were to bring an action in the Courts at Westminster, it would be necessary to make her husband a party to it.¹ This subject is learnedly discussed in *Beard v. Webb.*(e)

Now, so far with regard to a married woman's right to bind herself by contracts. But, with regard to her power of taking advantage of contracts made by other persons with her, the rule is somewhat different; for, it has been decided, that if a contract be made with the wife, on good consideration during the marriage, the husband may, if he please, take advantage of it, and recover in an action on it, in which action he may join his wife as a co-plaintiff. And if he die

(e) 2 B. & P. 93.

Arthur v. Broadnax, 3 Alab. 557; *James v. Stewart*, 9 Id. 835; and it perhaps would not be inconsistent with reason, to lay down as a rule, that where the wife has obtained credit as a feme sole, and her husband is absent at the time of the contract, and until and at the time of the bringing of the suit, a recovery may be had against her. It is doubtful, however, whether the English cases have to any extent abandoned the distinctions formerly taken by them, as, in *Barden v. Keverberg*, cited by the lecturer, Mr. Baron Parke said, that a party seeking to make a wife liable, "must make out that the husband was an alien, that he was resident abroad, and never in this country, and that the defendant represented herself as a feme sole, or that the plaintiff dealt with her, believing her to be so."—R.

¹ In Pennsylvania, South Carolina, and perhaps other States, the custom of London as to feme sole traders, has been imitated by statutory enactments: see *Burk v. Hinkle*, 2 Serg. & Rawle, 189; *Jacobs v. Featherstone*, 6 Watts & Serg. 346; *Newbiggen v. Pillans*, 2 Barr, 162; *Smith v. Taylor*, 4 M'Cord, 513; *Hobart v. Lemon*, 3 Richardson, 131; *Blythewood v. Everingham*, Id. 285.—R.

without taking any such step, the right to sue upon it will survive to the wife. One of the earliest authorities on this subject is *Brashford v. Buckingham*,^(f) where the wife had undertaken to cure a wound for the sum of ten pounds, which the patient was ungrateful enough not to pay; and after she and her husband had recovered judgment in an action of debt, a writ of error was brought in the Exchequer Chamber on the ground that a married woman could not sue. But the Court said, that, being grounded on a promise made to the wife, upon a matter arising upon her skill, and on a performance to be made to the wife, she is the cause of the action, *and so the action [*239] brought in both their names is well enough, and such action shall survive to the wife. Wherefore the judgment was affirmed. On the same principle, if a bond be made payable to her, she and her husband may sue upon it.^(g) (A) So if a promissory note be

(f) *Cro. Jac.* 77, confirmed in error, *Id.* 205.

(g) *Day v. Padrone*, 2 M. & Sel. 396, n. (b).

(A) Upon a deed *inter partes*, made during coverture, the effect of the authorities seems to be that, *prima facie*, the right of action on the covenant belongs to the wife, and would survive to her on the death of the husband, without his having reduced it into possession, by dissenting from her right in some operative way, as by taking a new security, so as to vest the interest in himself. Therefore, the coverture of the plaintiff in such a case cannot be pleaded in bar, and in an action brought by the plaintiff, the non-joinder of the husband can be pleaded only in abatement. *Bendix v. Wakeman*, 12 M. & W. 97.¹

¹ Coverture may be pleaded in abatement or in bar, according to circumstances; where the defence goes to the root of the demand, as, for instance, in an action on a bond given by the wife, it may be pleaded in bar: *Steer v. Steer*, 14 Serg. & Rawle, 379; but where the defence is merely the disability of the wife to sue in her own name, it must be pleaded in abatement: *Perry v. Boileau*, 10 Serg. & Rawle, 208; *Lyman v. Albee*, 7 Vermont, 508.—R.

made payable to her. [Is not the wife, said Lord Ellenborough, the meritorious cause of the action? she is the donee of the note, and it is acquired through her, and the note is a thing which of itself imports a consideration.^(h)] There is a very curious case of *Richards v. Richards*,⁽ⁱ⁾ in which a married woman took a note from her own husband and two other persons. And it was held, that, though no one could have sued on it in his lifetime, yet, that, after his death, she might sue the two surviving makers. [A case bearing some analogy to the last, and involving the same principle, afterwards came before the Court of Exchequer Chamber. This is the case of *Wills v. Nurse*,^(k) and is so instructive, that, although a little complicated in its facts, it is desirable to be noticed here. In this case an agreement between a man and his wife and C. of the one part, and D. of the other part, recited that the husband and wife and C. had sued one Lang, and obtained a cognovit from him; that Wills had given *a bail bond for him, which was forfeited; [*240] whereupon Wills requested the husband and wife and C. to let Lang be at large, and not proceed against the bail, on his guaranteeing the security of Lang's person if the debt were not paid on a certain day, on which day he would render Lang or pay the money. The Court held that the wife was entitled to join, for the wife, they said, was, as to part of the consideration, the meritorious cause of action. The cognovit was given in an action to which she was a party; the promise to forbear was, indeed, in point of law, that of the husband only, but it was made with reference to a subject-matter in which the wife was

(h) *Philliskirk v. Pluckwell*, 2 M. & Selw. 393.

(i) 2 B. & Ad. 447, E. C. L. R. vol. 22.

(k) 1 A. & E. 65, E. C. L. R. vol. 28.

interested. The defendant's agreement is in fact made with the husband and wife; the interest of the wife formed a substratum, upon which a right to join in the action was properly founded.] The decision in *Richards v. Richards* is approved of in *Gaters v. Madeley*,^(l) which is, I believe, the last case on the subject. In that case a promissory note was given to a married woman during the coverture. She survived her husband, and having afterwards herself died before the note was paid, it was held that her executor was entitled to maintain an action upon it. The rule is very clearly laid down in the judgment of Baron Parke. "This," said his Lordship, "is an action on a [*241] *promissory note—an instrument on which no one can sue unless he was originally party to it, or has become entitled to it under one who was. A promissory note is not a personal chattel in possession, but is a chose in action of a peculiar nature. It has, indeed, been made by statute assignable and transferable according to the custom of merchants, like a bill of exchange. Still, it is a chose in action, and nothing more. When a chose in action, such as a bond or note, is given to a feme covert, the husband may elect to let his wife have the benefit of it;¹ or, if he

(l) 6 M. & W. 423. See *Bendix v. Wakeman*, 12 M. & W. 97; *Guyard v. Suttou*, 3 C. B. 153, E. C. L. R. vol. 54

¹ There is a familiar class of cases in equity in which the husband has suffered the wife, after marriage, to acquire a separate property of her own, as where, in *Slanning v. Styles*, 3 P. Wms. 338, a husband permitted his wife to make profit of all the butter, eggs, and poultry, beyond what was used in the family, and borrowed of her £100, the fruit of these savings, she was held entitled to come in as a creditor upon his estate, after his death; so, in *Fettiplace v. Gorges*, 1 Vesey, Jr. 46; *Walter v. Hodges*, 2 Swanston, 103; *Rogers v. Fales*, 5 Barr, 157.

In a very recent case in the Exchequer, *Messenger v. Clarke*, 5

thinks proper, he may take it himself: and if, in this case, the husband had in his lifetime brought an action upon this note in his own name, that would have amounted to an election to take it himself, and to an expression of dissent on his part to his wife's having any interest in it. On the other hand, he may, if he pleases, leave it as it is; and in that case, the remedy on it survives to the wife;¹ or he may adopt another course, and join her name with his own; and, in that case, if he should die after judgment, the

Excheq. 388, a wife who lived apart from her husband, purchased stock in her maiden name, out of the allowance made to her by him, and having sold out this stock, and given the proceeds to her brother as a gift, the husband was held entitled to recover it from him after her death, the Court holding, that although her allowance was not subject to recall by her husband, yet that the stock when purchased, became his, and that she had no authority to dispose of it as a gift. It was said, however, that if it had been parted with for a valuable consideration, or the money been applied in payment of debt, it would have been otherwise. It is well settled with respect to the husband's right of disposition over his wife's choses in action, he cannot *give* them away: *Burnett v. Kinnaston*, 2 Vern. 401; *Jewson v. Moulson*, 2 Atkins, 417; *Mitford v. Mitford*, 9 Ves. 87; *Johnson v. Johnson*, 1 Jac. & Walker, 456; *Hartman v. Dowdel*, 1 Rawle, 281; *Parsons v. Parsons*, 9 New Hampshire, 322; whatever may be his power of barring her right of survivorship by an assignment or mortgage for a valuable consideration, or an application of them in discharge of a debt. See *Ryland v. Smith*, 1 Mylne & Craig, 53.—R.

¹ It has however been held in Massachusetts, that a note given or indorsed to a wife during coverture, is to be considered a actually reduced into possession, and at the husband's death would therefore go to his representative, to the exclusion of the wife's survivorship: *Shuttleworth v. Noyes*, 8 Mass. 229; *Commonwealth v. Marley*, 12 Pick. 173. He may, indeed, in such cases sue alone, and thus exercise his power of reducing it into possession, but until he does so, or receives the money without suit, it would seem that he cannot be considered as having at all interfered with it, so as to deprive her of her survivorship.—R.

wife would be entitled to the benefit of the note, as the judgment would survive to her."

Here you see all the possible cases are put, and the consequence of each pointed out, which makes this judgment a very useful one for the purpose of practical reference.

[Though it is settled law that a promissory note given to the wife during coverture is a chose in action, and not a personal chattel vested in the [*242] husband, and that upon his death the right to sue on it survives to the widow unless the husband has reduced it into possession, it is still a point of nicety and difficulty to determine what is a reducing into possession by the husband, such as to deprive the wife of her subsequent remedy. In the recent case of *Hart v. Stevens*,^(m) where the administrator of a deceased widow sued on a note given her *dum sola*; the Court held that the husband of the deceased, by receiving interest on the note during the life of the wife, had not reduced it into possession; and it seems to have been assumed that receiving money on it, or bringing an action for it, are alone sufficient reductions into possession; a doctrine apparently sanctioned by that of Lord Kenyon, C. J., in *Milner v. Milner*,⁽ⁿ⁾ and by Lord Hardwicke in *Garforth v. Bradley*,^(o) who puts it on the ground of dissent to the interest remaining in the wife thereby evidenced on the part of the husband. In the still later case of *Scarpellini v. Atcheson*,^(p) a case which presents some noticeable features, the plaintiff was a widow, and the payee of a promissory note made to her during coverture by the defendant. The husband caused the wife, as the plea

^(m) 6 Q. B. 937, E. C. L. R. vol. 51.

⁽ⁿ⁾ 3 T. R. 631.

^(o) 2 Ves. 675.

^(p) 7 Q. B. 864, E. C. L. R. vol. 53.

stated, "in his marital right," to indorse to *F.*, who after his death delivered it to the wife, who then *brought this action upon it. The Court embodied in the judgment the doctrine we have just stated, and held that the facts as stated did not amount to a reduction into possession by the husband.]¹ [*243]

Having thus disposed of the considerations arising on contracts made with or by infants and married women, I will postpone the conclusion of this branch of the subject till the next lecture.

¹ On the subject of reduction to possession by the husband of the wife's choses in action, see *Poor v. Hazleton*, 15 New Hamp. 564; *Stoner v. The Commonwealth*, 16 Penna. State Rep. 387; *Barron v. Barron*, 24 Vermont, 375; *Abbingdon v. Travis*, 15 Missouri, 240.

PARTIES TO CONTRACTS.—INSANE PERSONS.—INTOXICATED PERSONS.—ALIENS.—CORPORATIONS.—PUBLIC COMPANIES.—THE MODE IN WHICH COMPETENT PERSONS CONTRACT.—AGENTS.—PARTNERS.

PURSUING the inquiry upon which I entered in the last lecture with regard to the competency of the parties to *Contracts*, and having disposed of the cases of *Infancy* and *Coverture*, the next in order is that of persons of *non-sane* mind, whose disability arises, not, as in the two former cases, from a positive rule of *law*, but from the very nature of their disorder itself.

In the earliest ages of our law the rule on this subject appears to have been, that a person deprived of the use of that reason which is the *instrument*, if I may so say, with which men contract, shall not be bound, to his own injury, by contracts made while in such a situation. Thus, in Fitzherbert's *Natura Brevium*, 202, it is laid down, that a person who had enfeoffed another of his land while *non compos* might, on recovering his intellects, avoid the feoffment.

[Subsequently, opinions seem not to have been [*245] *very well settled.(a) But it is now clearly held] that the lunacy of one of the contracting parties may be shown by himself if sued upon a contract entered into while he was in that situation.¹

(a) 2 Bla. Com. 291; Yates v. Boen, Stra. 1104; Faulder v. Silk, 3 Camp. 126.

¹ Mitchell v. Kingman, 5 Pick. 431; Rice v. Peet, 15 Johns. 503; Grant v. Thompson, 4 Connect. 203, 1 Story's Eq. Jnr. § 225.—R.

However, it would not be for the lunatic's own benefit to prohibit him *absolutely* from binding himself by any contract whatever. Such a prohibition might prevent him from obtaining credit for the ordinary necessities of life; and there are many modern cases in which contracts evidently of a fair and reasonable description entered into with a lunatic have been held binding on him, and have been enforced. In the case of *Baxter v. Earl of Portsmouth*,^(b) an action was brought against the Earl of Portsmouth for the hire of several carriages. It was proved that the carriages were suitable to his rank and fortune, and that the price charged for them was a fair and reasonable one; but on the other hand it appeared that an inquisition had issued out of Chancery under which the Earl was found to have been insane from a period long anterior to the time at which the carriages in question were supplied to him. The L. C. J. Abbott, before whom the case was tried, directed the jury, that, as the articles hired were suitable to the station and fortune of the defendant, and as the plaintiffs, at the time of making the contract, had no reason to suppose him of [*246] *unsound mind, and could not be charged with practising any imposition upon him, they were entitled to recover; and the jury accordingly found a verdict for the plaintiffs. Mr. (now Lord) Brougham moved in the next term to set it aside, but the Court supported the direction of the Lord Chief Justice.

In a subsequent case of *Brown v. Jodrell*,^(c) the lunatic was the chairman of a society called the Athænaion, and he had concurred in ordering work and goods

(b) 5 B. & C. 170, E. C. L. R. vol. 11.

(c) M. & M. 105, E. C. L. R. vol. 22; 3 Car. & P. 30, E. C. L. R. vol. 14; S. C. See also *Dane v. Kirkwall*, 8 Car. & P. 679, E. C. L. R. vol. 34.

to be supplied to them; for these Lord Tenterden held that he might be sued by the person who had supplied them. From these decisions it is plain that a lunatic's contracts are binding in many instances; and some treatises suggest that he stands on the same footing with an infant, and is liable only for necessities. But this is, I think, not quite so; nor would it be reasonable that it should be so; for, where a lunatic is permitted to go about and appear to the world as a person of sane mind, it would be very hard indeed to prevent persons who had supplied him with goods under that impression at a fair price from recovering because the articles were not necessities. And, in the case I have just cited, of *Brown v. Jodrell*, an infant could not, I think, have been held liable for goods supplied to the Athenæon. One of the latest cases in which the subject has been canvassed, is that of **Tarbock v. Bispham*, (d) in which one of the questions was, whether a lunatic labored under the same incapacity to bind himself by stating an account as I have already shown you that an infant does. The case went off upon a different point, but the Court said, that, had it become material, they would have granted a rule for the purpose of considering it.

[This point was again discussed in the case of *Clarke and Another v. Medcalf and Others*, argued in the Court of Queen's Bench, in Hilary Term, 1841, and in which the judgment was given in the following Trinity Term, but is not reported. It however threw no new light whatever on the subject, and was decided in favor of the plaintiffs, who were London agents of the defendants, who were country attorneys; the action was for work done and money paid as such agents, and on an account stated. One of the defendants

pleaded insanity. But as there had been an executed contract, and for legitimate consideration, without notice of insanity, or any pretence of fraud by the plaintiffs, the Court adjudged for the plaintiffs, without entering into the question raised by the count on the account stated.

[It seems clear that a lunatic is liable upon an executed contract for articles suitable to his degree, furnished by a person who did not know of his *lunacy, and practised no imposition upon him.¹ [*248] It seems equally clear that he is not liable

¹ In the recent case of *Moulton v. Camroux*, 2 Exchequer, 501, which was an action to recover money paid by a lunatic for the purchase of an annuity, the jury found that the transaction was a fair and business one, and made by the defendants in good faith, and in ignorance of the plaintiff's unsoundness, and the Court in giving judgment for the defendant, thus reviewed the cases :

“The plaintiff's counsel distinguished the cases of *Brown v. Jordrell*, 1 Mood. & M. 105, and *Baxter v. The Earl of Portsmouth*, 2 C. & P. 178, 5 B. & C. 170, and other cases of that sort, on the ground that necessities furnished to a lunatic were an exception to the general doctrine that he could not make a contract ; and he cited the judgment of the Lord Chief Baron, in the case of *Gore v. Gibson*, as showing a distinction between express and implied contracts, and deciding that all express contracts were void, if the parties to them were incapable of making a contract. On the other hand, it was argued by the defendant's counsel, that there was a distinction between contracts executed and executory ; that executory contracts could not be enforced, but that executed contracts could not be disturbed, if made in good faith and without notice of the incapacity ; and he called our attention to this, that all the cases cited were cases where damages for the breach of an executory contract were in question, but that no case had yet decided, that an executed contract, if perfectly fair and *bona fide*, could be questioned on the ground of the unsoundness of mind of both parties ; and he cited the cases of *Howard v. The Earl of Digby*, 2 Cl. & Fin. 634 ; *Williams v. Wentworth*, 5 Beav. 325 ; and *Selby v. Jackson*, 6 Beav. 192, to show that the House of Lords in the first case, and Lord Langdale in the two last, had recognized the liability of lunatics or their estate, in respect of contracts *bona fide*

when the other contracting party has taken advantage of his lunacy; indeed, that was the decision in *Levy v. Baker*, reported in a note to *Brown v. Jodrell*.

acted upon. The case of *Neill v. Morley*, 9 Ves. 478; before Sir William Grant, to the same effect, had been cited before, by the counsel for the plaintiff.

"As far as we are aware, this is the first case in which it has been broadly contended that the executed contracts of a lunatic must be dealt with as absolutely void, however entered into, and although perfectly fair, *bona fide*, reasonable, and without notice, on the part of those who have dealt with the lunatic.

"On looking into the cases at law, we find that, in *Brown v. Jodrell*, Lord Tenterden says, 'I think the defence (of unsoundness of mind) will not avail, unless it be shown that the plaintiff imposed on the defendant.' In *Baxter v. The Earl of Portsmouth*, 5 B. & C. 170 (the *Nisi Prius* authority of which is in 2 C. & P. 178), Abbott, C. J., with the concurrence of the rest of the Court, laid down the same doctrine. In *Dane v. Viscountess Kirkwall*, Mr. Justice Patterson, in directing the jury, said, 'It is not sufficient that Lady Kirkwall was of unsound mind, but you must be satisfied that the plaintiff knew it, and took advantage of it.'

"We are not disposed to lay down so general a proposition, as that all executed contracts *bona fide* entered into must be taken as valid, though one of the parties be of unsound mind; we think, however, that we may safely conclude, that when a person, apparently of sound mind, and not known to be otherwise, enters into a contract for the purchase of property which is fair and *bona fide*, and which is executed and completed, and the property, the subject-matter of the contract, has been paid for and fully enjoyed, and cannot be restored so as to put the parties in *statu quo*, such contract cannot afterwards be set aside, either by the alleged lunatic, or those who represent him. And this is the present case, for it is the purchase of an annuity which has ceased." This judgment was subsequently affirmed on error in the Exchequer Chamber; 4 Excheq. 18.

The same principle was adopted in Pennsylvania, in *Beals v. Lee*, 10 Barr, 60 (following *La Rue v. Gilkyson*, 4 Id. 375), where it was held that the administrator of a lunatic could not, in the absence of fraud or knowledge of his state of mind, or such conduct on the part of the lunatic from which his disease might fairly be inferred or suspected, recover back the price of merchandise sold to him, even though

[The above cases and reasonings of Mr. Smith still deserve great consideration, but since the publication of his book the law upon the subject has been reviewed by the Court of Exchequer in the case of *Molton v. Camroux*.(e) That was an action for money had and
(e) 2 Exch. 487.

it was unsuited to the object for which it was purchased, and above the market price.

In Massachusetts, however, in the case of *Seaver v. Phelps*, 11 Pick. 304, which was trover for a promissory note, pledged by the plaintiff while insane, to the defendant, the Court were, on behalf of the latter, requested to charge, that although the plaintiff might have been insane at the time of making the contract, yet that if the defendant were not apprised of that fact, or had no reason, from the conduct of the plaintiff or from any other source, to suspect it, and did not overreach or impose upon him, or practise any fraud or unfairness, the contract could not be annulled; but the Court refused so to charge, and the jury having found for the plaintiff, the Supreme Court affirmed the judgment, on the authority of *Thompson v. Leach*, 3 Mod. 310, and regarded the law on the subject of contracts made by lunatics, as being on the same footing as those of an infant; and it was said that the case of *Baxter v. The Earl of Portsmouth*, *supra*, was, notwithstanding the dicta in the case, decided mainly on the ground of the carriages being suitable to the defendant's condition in life, and the opinion of Lord Tenterden, in *Brown v. Jodrell*, *supra*, as to the materiality of the absence of imposition, was disapproved. It may be remarked, however, that *Thompson v. Leach* is not an authority for such a point, further than that, "the *grants* of infants, and of persons *non compos mentis*, are parallel both in law and reason," and this is a well-settled rule of the law of *real* estate, the grants of both being voidable: *F. N. B.* 202 n.; *Mitchell v. Kingman*, 5 Pick. 431; *Allis v. Billings*, 6 Metcalf, 419 (see the termination of the case in 2 Cush. 19, by which it appears that the party was, at times at least, only feigning insanity): *Fitzgerald v. Reed*, 9 Smedes & Marsh. (Miss.) 102. The recent case of *Hallett v. Oakes*, 1 Cushing, 296, was an action to recover the value of professional services in a *habeas corpus* to procure the liberation of one who was insane and remanded as such, and a recovery was allowed on the ground of such services being classed with necessities, and having been rendered by the plaintiff in good faith, and on due inquiry into the grounds and causes of the confinement.—R.

received, brought by the administrator of an intestate, to recover from an annuity society the price paid by the intestate for annuities granted by the society. The ground was, that the intestate was not of sound mind when he paid the money. The elaborate judgment delivered by Pollock, C. B. will amply repay an attentive perusal. "As far as we are aware," the Court said, "this is the first case in which it has been broadly contended, that the executed contracts of a lunatic must be dealt with as absolutely void, however entered into, and although perfectly fair and bona fide, reasonable, and without notice on the part of those who have dealt with the lunatic;" and the Court refused to allow the money to be recovered back. The case was carried by a writ of error into the Court [*249] of Exchequer Chamber, (f) and that Court *laid down, that when the lunatic's state of mind was unknown to the other contracting party, and no advantage was taken of him, and the contract was not merely executory, but executed in the whole or in part, and the parties cannot be restored to their original position, the contract is not void on account of lunacy. A subsequent case of *Beavan v. M'Donnell*, (g) differed in some degree from the one last cited. It was brought by the lunatic to recover a deposit paid on a contract for the purchase of real estate, the title of which he was to accept unless he objected within a specified time. It was admitted upon the pleadings that the lunatic was of unsound mind, and therefore incapable of contracting, or of understanding the meaning of a contract, or of managing his affairs, and that the contract was of no use or benefit to him, but that his state was unknown to the defendant. The Court

(f) *Molton v. Camroux*, 4 Exch. 17.

(g) 23 L. J. (Exch.) 94; 9 Exch. 309, S. C.

said, that the contract was entered into by the defendant fairly and in good faith, and without knowledge of the lunacy; and being a transaction completely executed, so far as the deposit is concerned, the defendant has done all he ought to do to make it his own. The plaintiff has had all he bargained for, the power of buying an estate, and a title established in a given time, on payment of the residue of the purchase-money. The Court thought the case came within the principle upon which *Molton v. Camroux* was decided, *and that it made no difference that it was ad- [*250] mitted that the plaintiff was incapable of understanding the meaning of contracts; whereas in the former case it was not necessarily to be inferred that he was incapable of knowing the nature of his acts. As a lunatic is liable upon such contracts entered into by himself, so he is liable for necessities furnished to his wife, (*h*) he having become lunatic since the marriage; for, by contracting the relation of marriage, a husband takes on himself the duty of supplying his wife with necessities; and if he does not perform that duty, either through his own fault or in consequence of a misfortune, such as lunacy, the wife has by reason of that relation an authority to procure them herself, and the husband is responsible for what is so supplied. But it would seem to be the better opinion that an executory contract entered into by a lunatic of non-sane mind at the time he entered into it, cannot be enforced against him.]

As the law regarding the contracts of lunatics has experienced some alteration, so also has the law regarding contracts entered into by the class of persons whom I shall next specify,—I mean persons deprived of the use of their ordinary understanding by intoxica-

(*h*) *Read v. Legard*, 6 Exch. 636.

tion. It has been always admitted, that, if one man by contrivance and stratagem reduced another to a state [*251] of inebriety, and *induced him, while in that state, to enter into a contract, it would be void upon the ordinary ground of fraud; for the liquor would be in such case an instrument used by the one party to assist him in his plot against the other. (i)¹ But it has been supposed, that where the drunkenness of the contracting party was occasioned, not by the fraud of the contractee, but by his own folly, he could not in such a case set it up as a defence; since, by doing so, he would take advantage of his own wrong. You will see this view taken in *Coke Litt.* 247 a, and even so late as *Cory v. Cory*. (k) There are, however, several late cases, in which it seems to have been treated as erroneous. In *Pitt v. Smith*, (l) issue had been joined upon the question whether there was an agreement between the plaintiff and defendant for the sale of an estate. It turned out that there was an *agreement* signed, in fact, but that one of the parties when he signed it was intoxicated; Lord Ellenborough said:—

“There was no agreement between the parties, if the defendant was intoxicated, in the manner supposed when he signed this paper. He had not an *agreeing mind*. Intoxication is good evidence upon a plea of *non est factum* to a deed, of *non concessit* to a grant, or *non assumpsit* to a promise;” and he directed a non- [*252] suit, which the full Court *afterwards refused to set aside. In *Fenton v. Holloway*, (m) Lord

(i) *Gregory v. Frazer*, 3 Camp. 454; *Brandon v. Old*, 3 Car. & P. 440, E. C. L. R. vol. 14.

(k) 1 Ves. 19.

(l) 3 Camp. 33.

(m) 1 Stark, 126, E. C. L. R. vol. 2.

¹ *Hotchkiss v. Fortson*, 7 Yerger, 67; *Harvey v. Pecks*, 1 Munford, 518.—R.

Ellenborough again ruled in the same manner.⁽ⁿ⁾¹ [It may be considered as now settled, that intoxication avoids a contract when it is so complete as to prevent a man from knowing what he is about: in that

(n) See *Sentance v. Poole*, 3 Car. & P. 1, E. C. L. R, vol. 14 ; *Cooke v. Clayworth*, 18 Ves. 12.

¹ In *Gore v. Gibson*, 13 Mees. & Wels. 625, Pollock, C. B., referred to the conclusion drawn from the authorities by Chancellor Kent, in his Commentaries (vol. ii, p. 451), viz.: that no contract made by a person in that state, when he does not know the consequences of his acts, is binding upon him; and added, that it seemed to be in accordance with reason and justice. It is immaterial, moreover, whether the drunkenness, if carried to that extent, were voluntary, or the result of design on the other party: *Barratt v. Buxton*, 2 Aikin, 167; *Wiggleworth v. Steers*, 2 Hen. & Munf. 70; *Prentice v. Achorn*, 2 Paige, 30; *Rooke v. Clayworth*, 18 Vesey, 15. And on the other hand, it is equally well settled, that mere intoxication, unless carried so far as to benumb the understanding, will not of itself constitute a defence to the performance of a contract, or afford a ground for its rescission if executed: *Belcher v. Belcher*, 10 Yerger, 121; *Pittinger v. Pittinger*, 2 Green's Ch. 156; *Ford v. Hitchcock*, 8 Ohio, 214; *Jenners v. Howard*, 6 Blackford, 240. Whether the intoxication was so complete as to destroy "the agreeing mind," is, of course, a question for the jury. *Burroughs v. Richmond*, 1 Green (Law), R. 238. If, however, it were proved that advantage was taken of a person excited by drink, though not to such an extent as to impair all his reasoning faculties, it is apprehended that at law the case might be brought within the ground of fraud, although the contracting party might not have been directly incited to drink by the other; and it is well settled that equity will afford relief under such circumstances: *Reynolds v. Wall*, 1 Washington, 164; *Crane v. Conklin*, Saxton (N. S.), 346; *Hutchinson v. Tindell*, 2 Green's Ch. 357; *Pittinger v. Pittinger*, Id. 156; *Conant v. Jackson*, 16 Vermont, 335; *Campbell v. Spencer*, 2 Binney, 133; and so when the mind is enfeebled by habitual intoxication: *Wilson v. Bigger*, 7 Watts & Serg. 124; *Morrison v. M'Cord*, 2 Dev. & Batt. Eq. 221. It is evident, however, that although one may, by reason of drunkenness, be incapable of contracting, yet his contract may be ratified by his retaining the subject of the contract when sober: *Gore v. Gibson*, supra.—R.

state he is, in common parlance, "not himself," nor are his acts his own. "It is just the same," said Mr. Baron Alderson(o) in an action on a bill by indorsee against indorser (who pleaded drunkenness):—"it is just the same as if the defendant had written his name upon the bill in his sleep, in a state of somnambulism." In that case the law was explained by the learned Judges:—

1. As regards the state of the drunken man, where, said Mr. Baron Barke, he enters into the contract in "such a state of drunkenness as not to know what he is doing, and particularly when it appears that this was known to the other party, the contract is void altogether. A person who takes an obligation from another under such circumstances is guilty of actual fraud." It can scarcely be that the other party can be ignorant of the complete drunkenness of the person he contracts with personally. But many cases might arise where the party suing was neither present nor cognizant of the state in which the defendant signed [*253] or *authorized the contract. It seems that the question would there arise as to the consideration.

2. If the consideration were for necessities, Mr. Baron Alderson said, that a party, "even in a state of complete drunkenness, may be liable in cases where the contract is necessary for his preservation, as in the case of a supply of actual necessities; so also where he keeps the goods when he is sober; although I much doubt whether, if he repudiated the contract when sober, any action could be maintained on it." The Lord Chief Baron also said, "So a tradesman who supplies a drunken man with necessities may recover the price of them, if the party keeps them when he

becomes sober; although a count for goods bargained and sold would fail." The distinction is thus well shown. To support a count for goods sold and delivered, proof of acceptance as well as delivery is requisite, and if there had been acceptance, the plea of drunkenness would not avail; the keeping of the goods would be proof of acceptance, and the sober assent thus evidenced would ratify the drunken contract. But into the support of a count for goods bargained and sold delivery does not enter, as long as the contract was complete at the time, and the plea of intoxication, if sustained, would be a complete defence, for there could have been no acceptance to waive it.]

I have now to direct your attention to aliens. And we again subdivide this class into two minor ones, *of alien friends, and alien enemies. With [*254] regard to *alien friends*, they have a right to contract with the subjects of this country, and may sue on such contracts in the Courts of this country, (p) whether the contract was made in England or abroad, with this distinction, that, if it was made in England, it is expounded according to the law of England;¹ if

(p) Bac. Abr. Aliens, D.; Com. Dig. Alien, C. 5.

¹ Provided the subject of the contract be personal property. But it is well settled on this side of the Atlantic that any interest or title to real estate can only be acquired or transferred according to the *lex loci rei sitæ*, and not according to the *lex loci contractus*: Cutter v. Davenport, 1 Pick. 81; Horsford v. Nichols, 1 Paige, 220; Chapman v. Robertson, 6 Paige, 630; Wills v. Cowper, 2 Ham. 124. Such, too, seems to be the law in England: Robinson v. Bland, 1 W. Black, 246, S. C. 2 Burr. 1079; Scott v. Allworthy, 2 Dow & Clarke, 412; Fergusson on Mar. & Div. 395; Curtis v. Hutton, 14 Ves. 541; Birtwhistle v. Vardill, 5 B. & Cress. 438; S. C. 9 Bligh, 32. Some of the foreign jurists, however, do not recognize this distinction between movables and immovables. See Story's Conflict of Laws, § 52, &c.—R.

abroad, according to the law of the country where it was made: but, whether it was made abroad or in England, the person who sues on it here must take the remedy here as he finds it, although, perhaps, abroad there might have been a more advantageous one. Thus, for instance, according to the law of England, if a bill of exchange be payable to A. or order, A.'s indorsement in blank, that is, his simply writing his name on the back, is sufficient to transfer the property in it to any one to whom he may think fit to hand it; whereas, according to the law of France, a special indorsement, that is, an indorsement naming the transferee, is necessary for the same purpose. Now if an action be brought in the Queen's Bench here by the indorsee of an English bill, he will recover on showing an indorsement in blank, whereas, if the action were brought by the indorsee of a French bill, he would be obliged to show a special indorsement. And the reason of this is, that the law of the country

[*255] where a contract is made being *by implication incorporated into the contract, it is considered to be part of a contract arising on such a bill made in England, that it shall be transferable by an indorsement in blank, and part of the contract arising on a French bill, that it shall be transferable only by a special indorsement. See *Trimbey v. Vignier*.(q) Again, to an action on a bill of exchange, the French period of limitation is *five* years, ours is *six*; now, if an action be brought here on a French bill, the Courts here will not adopt the French period of limitation, but our own, and so the payee may recover here at any time within six years, though in France, where

(q) 1 Bing. N. C. 151, E. C. L. R. vol. 27. See further on this subject, *Rothschild v. Currie*, 1 Q. B. 43, E. C. L. R. vol. 41; *Gibbs v. Fremont*, 22 L. J. (Exch.) 302.

the bill was made, he must have brought his action within *five*; the reason for which is, that the period of limitation within which a remedy is to be pursued is part and parcel of the remedy itself, and though a *contract* is interpreted by the law of the country where it is made, the *remedy* must be pursued as it exists in the country where the suit is brought.(r)

I have rather digressed, for the purpose of pointing out these two rules to you. They are two of the most celebrated principles of our law, and there is scarcely any question arising on a foreign *contract [*256] which they will not solve. You will see them carried out and explained in *British Linen Company v. Drummond*,(s) *De la Vega v. Vianna*.(t)¹

So far with regard to contracts made with alien friends; now with regard to *alien enemies*, i. e. aliens whose government is at war with this country. All contracts made with them are wholly void;² *Brandon v. Nesbitt*,(u) *Willison v. Patteson*,(x) in which latter

(r) *Huber v. Steiner*, 2 N. C. 202; *Cocks v. Purday*, 5 C. B. 860, E. C. L. R. vol. 57; *Leroux v. Brown*, 22 L. J. (C. P.) 1.

(s) 10 B. & C. 903, E. C. L. R. vol. 21.

(t) 1 B. & Ad. 284, E. C. L. R. vol. 20. (u) 6 T. R. 23.

(x) 7 Taunt. 439, E. C. L. R. vol. 2.

¹ The student will find all the law upon this interesting subject collected in the 8th and 14th Chapters of Story's *Conflict of Laws*.—R.

² There is an exception to this rule which naturally springs from it, which is, that contracts made with an alien enemy for the payment of ransom-money or for subsistence, can be enforced. Thus, in *Antoine v. Morehead*, 6 Taunton, 237, 1 E. C. L. R., an alien to whom was indorsed a bill of exchange, drawn by one English subject, detained a prisoner in France, upon another subject, was held entitled to recover its amount in England after the return of peace.

In the well-known case of *Griswold v. Waddington*, 15 Johnson, 57, in error, 16 Id. 438-510, the whole law upon the subject of contracts with alien enemies was elaborately examined in an able opinion by Mr. Chancellor Kent.—R.

case it was decided, that, if the contract was made during war, it does not become capable of being enforced even on the return of peace. Although, if a contract be made with an alien friend, and a war afterwards breaks out between his country and this, the effect is to suspend his right to sue upon the contract until the return of peace, not wholly to disqualify him from so doing.(y)

[It seems sufficiently connected with the subject of this work to add, that, by the Common Law, aliens may acquire and possess within this realm, by gift, trade, or other means, any goods personal whatever, as well as an Englishman.(z) By the Act to amend the laws relating to aliens, 7 & 8 Vict. c. 66, s. 45, every alien subject of a friendly state may take and [*257] hold, by purchase, gift, bequest, *representation, or otherwise, every species of personal property, except chattels real, with the same rights, remedies, and capacities, as if he were a natural born subject of the United Kingdom. And every such alien residing here may, by grant, lease, demise, assignment, representation, or otherwise, take and hold any lands, houses, or other tenements, for the purpose of residence or of occupation, or for the purpose of business, trade, or manufacture, for any term not exceeding twenty-one years.

The Secretary of State, moreover, may, if he sees fit, grant to any alien by certificate all or any of the rights and capacities of a natural born subject, except that of being a member of the Privy Council or of either House of Parliament: 7 & 8 Vict. c. 66, s. 8.]

Another class of persons who are disabled from en-

(y) *Flindt v. Waters*, 15 East, 260 ; *Alcenius v. Nygrin*, 24 L. J. (Q. B.) 19.

(z) *Calvin's case*, 7 Co. Rep. 1.

forcing contracts are outlaws, and persons under sentence for felony.(a) They are, however, liable upon the contracts made by them while in that situation, though incapable of taking advantage of them.(b) [This disability is removed by pardon; and when the attainder or outlawry is removed, the party may contract and sue as before.(c)]

There is one other class, I was about to say of individuals, but that would have been incorrect (for, although *persons* in the eye of the law, they [*258] *are not individuals in common parlance), regarding whose power of contracting I have a few words to say,—I mean *corporations aggregate*. A corporation aggregate consists, as you know, of a number of individuals united in such a manner that they and their successors constitute but one person in law. Thus, the mayor, aldermen, and burgesses of a borough are a corporation, and as such have an existence distinct from that of the individual mayor, and of the individuals enjoying the franchise of burgess or post of alderman. But then, this corporate existence being an ideal one, and the creature of the law, it is obviously impossible that the corporation can contract in the same way as an ordinary person. Accordingly the law, the creature of which, as I have said, it is, has provided for it a mode of contracting, namely by its common seal, which, being affixed to the contract, authenticates it, and makes it the deed of the corporation; and, as a general rule, that is the only way in which a corporation can contract.(d) [A few instances will show the force and the application of

(a) *Bullock v. Dodds*, 2 B. & A. 258.

(b) *Ramsey v. Macdonald*, Foster, C. C. 61.

(c) Bac. Abr. "Outlawry."

(d) Com. Dig. Franchises, F. 13.

this important rule. Thus, in *The Mayor of Ludlow v. Charlton*,^(e) the defendant had laid out a sum of money in pulling down and altering an inn and doing other work, at the request and for the convenience of the corporation, confiding in their promise to pay him [*259] that sum for such *work; but though he laid out more than that sum, he was unable to charge the corporation with it, from having neglected the very obvious and easy mode of binding the corporation by deed, as the law prescribes. Even an entry by the corporation in their own books of a minute of this agreement, was not admitted to bind them. In *Arnold v. The Mayor of Poole*,^(f) the plaintiff had performed the duties of attorney to the corporation of that place, which had incurred a large debt to him; but having only been appointed by the mayor and council, and not under the seal of the borough, he could not recover his costs, although the council of the borough had passed a resolution directing the business to be done by him, and knew of its progress. In *Paine v. The Guardians of the Poor of the Strand Union*,^(g) the guardians, who are a corporation by statute, had ordered the plaintiff, a surveyor, to make a survey and a map of the ratable property in a parish which was part of the Union, but as the plaintiff had not insisted upon having his retainer under seal, he was unable to recover for the survey or the map.] But to this rule, as to most other general rules, necessity and the convenience of the world have occasioned some exceptions; the principal of which is, that, when a corporation has been created for mercan-

(e) 6 M. & W. 815.

(f) 4 M. & G. 860, E. C. L. R. vol. 43. See *Queen v. Mayor, &c. of Stamford*, 6 Q. B. 433, E. C. L. R. vol. 51.

(g) 8 Q. B. 326, E. C. L. R. vol. 55.

tile purposes, it *is allowed to enter without seal into certain contracts,—for instance, bills of exchange—(which are usually entered into without seal by commercial men), [or such as hiring a servant, authorizing another to drive away cattle damage feasant, or to make a distress, and the like—matters so constantly recurring, of so small importance, or so little admitting of delay, that the head of the corporation has from the earliest times been considered as delegated by the rest of the members to act for them.]^(h) In the case just cited, the Imperial Gas Light Company were empowered by the Act incorporating them, to make gas, and to sell and dispose of it in such manner as they should think proper, with full power to supply and light with gas the shops, houses, streets, &c., in the places mentioned. The statute further enacted that the directors should have the custody of the common seal, with full power to use it for the affairs and concerns of the company, and should have power to direct and transact the affairs and business of the company, as well in laying out and disposing of money for the purposes of the same, as in contracting for and purchasing lands and tenements, materials, goods, and chattels for the use of the company, *&c., and selling and disposing of all lands, &c., and all articles produced as aforesaid. The defendants entered into a simple contract with the plaintiff, to supply him gas at a certain rate, and the Court held that they had power to enter into this contract, and to sue in assumpsit for the price

(h) See *Ludlow v. Charlton*, 6 M. & W. 821; *Church v. Imperial Gas Light Co.* 6 A. & E. 846, E. C. L. R. vol. 33; *R. v. Bigg*, 3 P. Wms. 419; *Beverley v. Lincoln Gas Co.* 6 A. & E. 829, E. C. L. R. vol. 33; *Clarke v. The Guardians of the Cuckfield Union*, 21 L. J. (Q. B.) 349.

of the gas supplied. The general rule of law, said the Court in delivering its judgment, is, that a corporation contracts under its common seal; as a general rule it is only in that way that a corporation can express its will, or do any act. That general rule, however, has from the earliest traceable periods, been subject to exceptions, the decisions as to which furnish the principle on which they have been established, and are instances illustrating its application, but are not to be taken as so prescribing in terms the exact limit, that a merely circumstantial difference excludes from the exception. This principle appears to be convenience, amounting almost to necessity. Wherever to hold the rule applicable would occasion a very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has prevailed. Hence, the retainer by parol of an inferior servant, the doing of acts very frequently recurring, or too insignificant to be worth the trouble of affixing the common seal, are established exceptions. On the same principle stands the power of accepting bills of exchange and issuing promissory notes by companies [*262] *incorporated for the purposes of trade, with the rights and liabilities consequent thereon. We must understand this company to have been incorporated for the purpose of supplying individuals willing to contract with them for gas-light. "Such contracts are of almost daily occurrence, and to hold that for every one of them, of the same or less amount, it was necessary to affix the common seal, would be so seriously to impede the corporation in fulfilling the very purpose for which it was created, that we think we are bound to hold the case fairly brought within the principle of the established exceptions."

[But unless the nature of the business for which

the corporation was created, necessarily implies the existence of these powers of contracting otherwise than by deed, it will not have them.¹ Thus it has been held(*i*) that when the East India Company granted a retiring pension to a military officer for services performed to them in the East Indies, but did not grant it under their common seal, the grant did not fall within the reason or principle of the exception, but must be governed by the general rule of law, that a corporation cannot be sued upon a contract, unless under seal. It is, indeed, obvious that the grant of this pension could have no connection whatever with the condition or powers of the company as a trading community, and consequently is not within the exception which has been established as to contracts entered into by *corporations instituted for the purposes of trade [*263] in matters relating to their trade, or to that respecting matters of daily occurrence of slight importance, which have been alluded to and will presently be mentioned again. And where the Governor and Company of Copper Miners(*k*) entered into a parol contract with a person to supply him with a large quantity of iron bars, it was held, that, as there was no evidence that the contract proved was in any way auxiliary to

(*i*) *Gibson v. East India Co.* 5 Bing. N. C. 262, E. C. L. R. vol. 35.

(*k*) *The Governor and Company of Copper Miners of England v. Fox*, 16 Q. B. 229, E. C. L. R. vol. 71.

¹ It is a general principle that a corporation has no power to enter into any contract, not within the scope of the objects for which it has been chartered, and it has been held that even where it has received and enjoyed the consideration, it may in a suit upon the contract take advantage of its defect of power. In such cases however the consideration may be recovered back. *Albert v. Savings Bank of Baltimore*, 1 Maryland Ch. Decis. 407; *Abbott v. Baltimore and Rappahannock Steam Packet Co.* Ibid. 542; *Beers v. Phoenix Glass Co.* 14 Barbour, 358.

the trade in copper, it must be held not a contract entered into for the purpose of carrying on the trading object for which the plaintiffs were incorporated, and did not bind them; and consequently, as there was no consideration for the defendant's promise, that he was not bound to perform it; and the Court said, that where a trading company is created by charter, while acting within the scope of the charter, it may enter into the commercial contracts usual in such a business, in the usual manner.] There are also some acts of trifling importance which every corporation may do without deed. [Much illustration as to these acts is afforded by the case of *Smith v. Cartwright*, decided in the Exchequer Chamber.^(l) It was an action by one of the coal-meters of King's Lynn, for disturbance in his office of coal-meter, in the exercise of which he claimed [*264] the *right to weigh coals brought into the port, and take a certain fee for weighing them; and it became a material question whether he was duly appointed meter or not. He had not been appointed under seal. The Court held, that, as the right he claimed was to discharge certain duties in regard to the property of third persons altogether against their will, and to demand a fee for so doing, this right must be by reason of his having an office, and not being a mere servant of the corporation, and consequently his appointment must, in order to be valid, be under the seal of the corporation. Had this not been so, but if the corporation had merely claimed a right to measure by persons appointed by themselves, such persons would be merely servants, and might well be appointed without seal.] You will also see an enumeration of these acts in *Com. Dig. Franchises, F. 13.*^(m) [They are

(l) 20 L. J. (Exch.) 401; 6 Exch. 927, S. C.

(m) See *Bro. Abr. Corp.* fol. 47-51, and in *Horn v. Ivy*, 1 Vent. 47.

treated by the Court of Common Pleas, in the great case of *The Fishmongers' Company v. Robertson*,⁽ⁿ⁾ as so well known as to require no enumeration in the judgment of the Court. They are apparently as ancient as the doctrine to which they are commonly stated to be exceptions. They do not depend upon any one principle, other than that convenience, amounting almost to necessity, which belongs to them in their very nature, and under *which they are ranked by the Court of Queen's Bench in *Church v. Imperial Gas Light Company*, before referred to. There is, however, a distinction between matters which do and matters which do not affect any interest of the corporation. The former must be authorized by the corporate seal. Thus they must appoint a bailiff by deed for entering upon lands for condition broken, in order to revest their estate; but they need not do so where the bailiff is only to distrain for rent.^(o) The only general rule to rely upon in practice is, that a corporation can contract only by deed under its common seal, unless there be some express authority in favor of its being allowed to make the particular contract in question without seal, or unless it possess powers different from those possessed by corporations in general.^(p)¹

(n) 5 M. & Gr. 192, E. C. L. R. vol. 44.

(o) *Smith v. Birmingham Gas Co.* 1 A. & E. 530, E. C. L. R. vol. 28; *Plow.* 91; *Jenkins*, 3d Cent. case, 68.

(p) *Hall v. Mayor, &c. of Swansea*, 5 Q. B. 526, E. C. L. R. vol. 48; *Broughton v. Manchester and Salford Waterworks Co.* 3 B. & A. 1.

¹ The excepted cases referred to in the decision in *The East London Waterworks Co. v. Bailey*, *supra*, were, 1, where the contract is executed; 2, where the acts done are of daily necessity, and too insignificant for the trouble of the seal; 3, where the corporation has a head, as a mayor or a dean, who may give commands; 4, where the act should from necessity be done immediately; and 5, where it is essential to a moneyed corporation, like the Bank of England, that it should have

[There is another important class of parties to contracts, whose agreements must, in order to bind them as a body, be entered into in a manner peculiar to themselves. These are public or joint stock companies. Nearly all of these are of recent origin, most of them

the power of issuing bills and notes. But the distinction between executed and executory contracts, which was the foundation of the first of these exceptions, was directly overruled in *Church v. The Imperial Gas Co.* 6 Ad. & Ell. 846, 33 E. C. L. R. That case, which decided that a corporation might maintain assumpsit for breach of an unsealed contract to accept gas from year to year at so much per annum, was rested on the second and fifth of the above exceptions, the contract being one of daily occurrence, and almost essential ("convenience amounting almost to necessity"), for the purpose of the corporation; and all the recent cases in England have been decided upon the same grounds: *Beverley v. The Lincoln's Inn Gas Light and Coke Co.* 6 Ad. & Ell. 829, 33 E. C. L. R.; *Paine v. Strand Union*, 8 Queen's Bench, 326, 55 E. C. L. R.; *Mayor of Ludlow v. Charlton*, 6 Mees. & Wels. 824; *Lamprell v. The Billericay Union*, 3 Exchequer, 306; *Diggle v. London and Blackwall Railway Co.* 5 Id. 442; *Finlay v. Bristol and Exeter Railway Co.* 9 Eng. Law & Eq. R. 483.

On this side of the Atlantic, however, a much more relaxed rule prevails, and it has long been settled that there is no distinction between the contracts of a corporation and a natural person, whether they are express or implied, either from acceptance of an executed consideration or from the ratification of acts done on its behalf by its members or others: *Bank U. S. v. Dandridge*, 12 Wheaton, 64; *Proprietors v. Gordon*, 1 Pick. 297; *Ross v. City of Madison*, 1 Smith (Ind.), 98; *Gasset v. Andover*, 21 Vermont, 102; and see many other cases collected in *Angell and Ames on Corporations*, 211, 212; 2 Kent's Com. 290 (whose statement of the law is referred to by *Patteson, J.* in *Beverley v. Gas Co.* *supra*), and the note to *Mayor v. Charlton*, 6 Mees. & Wels. 824, Am. Ed.—R.

The acts of a corporation, evidenced by a vote, written or unwritten, are as completely binding upon it, and as full authority to its agents, as the most solemn acts done under the corporate seal; and promises and engagements may as well be implied from its acts and the acts of its agents as if it were an individual: *Elysville Manufacturing Co. v. Okisko Co.* 1 Maryland Ch. Decis. 392; *Conro v. The Port Henry Iron Co.* 12 Barbour, 27; *Ross v. Madison*, 1 Carter, 281.

very recent. Some of these companies are incorporated, and others not, and some important distinctions exist at different periods of their growth, from a mere *party of individuals combining to promote the [*266] formation of a company, until they have achieved their object by effecting its incorporation. All these companies are created for some definite and prescribed object, and have already been slightly mentioned in treating of the power of corporations to contract. But the whole law respecting them is so new, and is in many respects so different from anything else existing in our jurisprudence, that the principles, analogies, and examples of the common law are often not applicable to cases where a public or joint stock company is one of the parties. It might, perhaps, have been more convenient for the purposes of commercial business, if, in establishing a new system of regulations for so many of the transactions of public companies, a closer analogy to the general rules of our law had been observed, as it certainly would have been more convenient for the purposes of public justice. But, in fact, a new system has been established; and it affects so many of the transactions of business, that an accurate acquaintance with it is one of the most important acquirements of the lawyer. So far, therefore, as the law of public companies respects the law of contracts, it will be explained here; but in order to do so, that interpretation of the common analogies of law which I have mentioned, renders it necessary to speak somewhat generally of the new system.

*Previously to the passing of the statute [*267] hereafter mentioned, so great a number of joint stock companies had been established, and so many more were projected, each striving to attain its object by means of its own, none having any regard to

the provisions of the law in analogous cases, and many violating them, that the greatest confusion and uncertainty were introduced into their transactions, and lamentable frauds and oppressions were committed. Several Acts of Parliament were passed remedying some of these evils, but being found insufficient, the Legislature passed some general enactments, of which the most important for the present purpose are, the Act for the registration, incorporation, and regulation of joint stock companies, 7 & 8 Vict. c. 110, which came into operation on the 1st of November, 1844; the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16; the Lands Clauses Consolidation Act, 1845, 8 Vict. c. 18; and the Railways Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 20. There is also a statute regulating joint stock banking companies, 7 Geo. 4, c. 46, by which, and by 7 & 8 Vict. c. 113, that important class of public companies is governed. These have removed much of the evil existing when they were enacted, but have established a system which varies much from the ordinary rules of law, and which can be learnt only by a careful study of the statutes [*268] themselves, and of the *decisions of the Courts upon the questions which have occurred in applying them to practice.

It is evident, therefore, that, for companies established before the passing of these Acts, the law is different from that by which companies since established are regulated. "A joint stock company of the former class is a partnership, consisting of a very large number of members, whose rights and liabilities would be precisely the same as those of any other partners, did not their multitude oblige them to adopt certain peculiar regulations for the government of the concern, which are ordinarily contained in an instrument called

a deed of settlement. Such is a joint stock company, the conduct of whose affairs has not been affected by the general enactments, which will presently be adverted to. Many such bodies still exist, but frequently the impossibility or great inconvenience of carrying on its business upon such a footing induced a company to add to the deed of settlement an Act of Parliament passed expressly for its purposes.”(q)

[It is common, as you are no doubt aware, both to this class of companies, and to those established since the 1st of November, 1844, when, as you will remember, the Act for registering and regulating joint stock companies took effect, that the joint stock or capital is divided into equal parts, called shares, the number of which belonging to *any member [*269] ascertains the amount which he has contributed to that stock or capital, and his consequent interest in the undertaking. The members or shareholders delegate all the ordinary business of the company to certain of its members, in whom they confide, and who are usually called directors, but reserve to themselves the right to interfere on specified occasions, together with a general control and superintendence.

[It is also common to the class of companies we are treating of, as well as to all others, that, in all cases which are not regulated by the deed of settlement and the private, or, as it is called, special Act, or by one or other of the general statutes we have mentioned, the common law prevails, and the rules apply which would apply to an ordinary partnership.(r) And, on the other hand, the parties having exchanged their mutual rights at common law for those stipulated for

(q) Smith's Mercantile Law, 5th ed. by Dowdeswell, p. 57.

(r) Holmes v. Higgins, 1 B. & C. 74, E. C. L. R. vol. 8; Wilson v. Curzon, 15 M. & W. 532.

in their deed, are bound by them, and cannot, as a general rule, act otherwise than in the stipulated manner. These results have been made very clear by the judgment of the Court of Exchequer, in *Bosanquet v. Shortridge*,^(s) in which case the deed of settlement had provided that no person should be registered as a shareholder without the consent of the board of directors; and it was endeavored *to be shown [*270] that the defendant had ceased to be a shareholder, having actually sold his shares to another, although the transfer was not with the consent of the board of directors. "It is necessary," said the Court, "that Courts of justice should act on general rules, without regard to the hardship which in particular cases may result from their application. This is the case of a joint stock company regulated by deed. All persons executing the deed are bound by whatever is done in pursuance of its provisions, but they are bound no further. The original body of shareholders agreed to trade in partnership, and they further agreed, that, by a certain stipulated mode, any one of this body might transfer his share to another, to be substituted in his place. But, unless the steps pointed out by the deed for making such transfer have been duly taken, the original body of shareholders remain partners, according to the terms of their deed of settlement. If, indeed, a case could be conceived where all the shareholders, at a particular time, had assented to a mode of transfer different from that stipulated for in the deed, they might be bound by what they had so agreed to. But such a state of things could hardly happen to a joint stock company like that in which the defendant was a member: and certainly no such

(s) 4 Exch. 699; *Kirk v. Bell*, 16 Q. B. 290, E. C. L. R. vol. 71.

universal consent can be taken to have existed here." The defendant was held to be still a member. [*271]

*[It is, perhaps, known to you that partners cannot in general sue each other in a Court of law on contracts on the subject-matter of the partnership, such suits opening the state of the partnership accounts, which can only be satisfactorily dealt with by Courts of Equity.(t) This rule being found extremely inconvenient in cases of joint stock companies, it was usual for companies established before the 1st November, 1844, to endeavor to evade it, by providing in the deed of settlement that the members should not take advantage of it, but should be estopped from so doing. But Courts of law not having the means of thoroughly investigating partnership accounts, it is very doubtful whether such a provision is valid; at all events, its validity has never been established. There is, however, nothing to prevent a member from recovering for work done and goods sold to the company before he became a member, or after he ceased to be one.(u)

[Another great inconvenience felt by a joint stock company of the class we are considering is, that no member can transfer his share without the consent of the rest; for such a company, being in most particulars an ordinary partnership, the consent of each partner is necessary to the introduction of a new one. It has, indeed, been *considered, that where the nature of the company was such that the members [*272] could not have intended that there should be no change in their body without their consent, such a consent was not necessary.(x) Thus, great doubts and difficulties and disputes have unavoidably arisen in endeavoring

(t) See Smith's Mercantile Law, by Dowdeswell, 5th ed. p. 27.

(u) Lucas v. Beach, 1 M. & Gr. 417, E. C. L. R. vol. 39.

(x) Fox v. Clifton, 9 Bing. 119, E. C. L. R. vol. 23.

to act without such consent. And in all ordinary cases the members have no peculiar rights or liabilities, but, as in an ordinary partnership, are parties to all the contracts of the company, entitled to the benefit of them, and responsible for their non-performance.

[Where a projected company has never been completed, persons who have advanced money with the intention of becoming members of it, may, if it has become abortive or been abandoned, recover the money they have advanced.(y) And the mere fact of an applicant for shares paying a deposit does not make him responsible for any preliminary expenses where the undertaking has not come into operation;(z) *à fortiori*, they may recover back money which they have paid for shares, where they have been induced by fraudulent representations to join a mere bubble company.(a) In the first of the cases just cited, it [*273] was admitted that a *written application for shares which had been made by the plaintiff, and a letter of allotment allotting them to him, constituted a valid contract in themselves; but it was proved, that many misrepresentations had been made, to which the defendant was a party, which had induced the plaintiff to pay money for the shares; and also that he had executed a deed, called the subscribers' agreement, under the same belief which had operated on his mind. The Court of Common Pleas were of opinion, "that there was no contract binding the plaintiff to part with his money at the time when he paid the deposit. He had applied for sixty shares in a concern, which was to have a capital of 3,000,000*l.*,

(y) *Nockles v. Crosby*, 4 B. & C. 814, E. C. L. R. vol. 10; *Walstab v. Spottiswoode*, 15 M. & W. 501.

(z) *Hutton v. Thompson*, 3 H. of L. Cas. 161.

(a) *Wontner v. Shairp*, 4 C. B. 404, E. C. L. R. vol. 56; *Watson v. Charlemont*, 12 Q. B. 856, E. C. L. R. vol. 64.

raised by the issue of 120,000 shares. The committee allotted to him a very different thing, but professed to allot to him that which he had asked for; and the letter of allotment, as well as the prospectus and advertisements, described the capital as 3,000,000*l.*, and the number of shares as 120,000. Now, it might be reasonable to expect that such an undertaking would succeed with a capital of 3,000,000*l.*; but perfectly absurd to suppose it could be accomplished for less than half that sum. The plaintiff, therefore, having asked for shares in a practical scheme, received shares in a scheme that was impracticable, and which was rendered so by the act of the committee in refusing to allot more than 58,000 shares, although more than the whole 120,000 *had been applied for by [*274] responsible parties. That which was allotted not being in truth that which the plaintiff had asked for, he was not bound to take it. Such being our opinion as to the alleged contract, we must inquire whether there was any evidence that the plaintiff was induced to pay his money by any fraudulent misrepresentation. If there was no fraudulent misrepresentation, the plaintiff ought to have been nonsuited, or a verdict should have been found for the defendant; but we think there was ample evidence of such misrepresentation. If we are to construe the advertisement, we think it means that all the shares had been allotted; and as it was a public advertisement, at least it must be taken to have been addressed to all who were interested in the subject-matter of it, of whom the plaintiff was undoubtedly one: to him it represented that he had got what he asked for, namely, sixty out of 120,000 shares in the proposed adventure. The jury, therefore, were well warranted in finding that the representation so made was a material inducement to him to pay his money. If the meaning

of the advertisement was for the jury, they appear to have construed it as we do. Either way there was ample evidence to be left to the jury on this point, and there is no ground for either a nonsuit or a verdict for the defendant."

[On the other hand, "where a prospectus is issued, [*275] and shares allotted, for a speculation, to *be carried on by means of a certain capital to be raised in a certain number of shares, a subscriber is not liable in the first instance, unless the terms of the prospectus in that respect are fulfilled; but if it be shown that he knows the directors are carrying on the undertaking with a less capital, and has acquiesced in their so doing, he may become answerable for their future contracts." (b) And as he is thus liable to the creditors of the company, he cannot complain at being compelled to fulfil his engagements with the other members.

[It is important to add here, that, although, as has been seen, a person will not become a partner where the original intention is not carried out, or where he has been induced by fraudulent misrepresentations to take shares, or where preliminary proceedings necessary for the establishment of the partnership are not completed; yet he may, of course, by his conduct, as well as by his words, acquiesce in what has been done; and, if he does so, he will become as liable in the one case as in the other; and when the partnership has once begun, whatever contract the managing persons make, which is a proper and usual contract for persons who carry on that kind of business to make, each member will be liable upon it, though contrary to the original stipulation. (c)

(b) *Pitchford v. Davis*, 5 M. & W. 2.

(c) *Hawken v. Bourne*, 8 M. & W. 703; *Tredwen v. Bourne*, 6 M. & W. 461.

*[Persons interested in promoting the establishment of a company were frequently, before the passing of the statutes already mentioned, induced to form themselves into what was called a provisional committee of such company. They also often persuaded the most respectable of their friends to join them; and very numerous, indeed, were the instances in which they found themselves liable for enormous debts incurred by other members of the committee in proceedings preliminary to the formation of the company. This injustice is now to a great extent prevented by the Act for the registration of joint stock companies, which will presently be mentioned. The mere facts of their allowing their names to be inserted in a prospectus, and published to the world as members of such a committee, of attending such a committee, although only for the purpose of objecting to what was done, and any slight evidence that they knew that their names had been published as committee-men by other people, were often considered sufficient to render them liable upon contracts for a projected company; and many hundreds of people were ruined by their supposed liability. Yet it is quite clear that these facts alone are not sufficient to make them liable. They are evidence of a connection with such a committee, and with the projected company; but the question is, whether such persons authorized other members of the committee to pledge their credit for matters necessary to the formation of the company. All their *acts in relation to the company are proper evidence upon this question. But they do not pledge their credit by the mere fact of their being members of the committee, or by accepting shares, or by paying a deposit upon them; (c) *à fortiori* it will

(c) *Reynell v. Lewis, Wylde v. Hopkins*, 15 M. & W. 517; *Lake*

not render them liable for debts incurred before they began to act. (*d*)

[On the 1st of November, 1844, the act for the registration, regulation, and incorporation of joint stock companies, 7 & 8 Vict. c. 110, came into operation. It affects every joint stock company established after that day for any commercial purpose, or any purpose of profit or of insurance, except banking companies, schools, scientific and literary institutions, friendly societies other than such as grant insurances of life to an amount exceeding 200*l.*, and also excepting companies for working mines upon what is called the cost book principle, Irish anonymous partnerships, and also companies which cannot be carried into execution without the authority of Parliament, or which may be incorporated by statute or charter. Its general object is to invest such companies with most of the qualities and incidents of corporations, and to prevent the establishment of any companies which *shall not be duly

[*278] authorized and regulated thereby. Objects which, if carried out, evidently tend to prevent many of the inconveniences before mentioned. In the first place, the statute prescribes the mode by which the promoters must establish the company. Before publishing any proposal for that purpose, they must make a return to the registrar of joint stock companies of the name and purpose of the company, and descriptions and residences of the promoters; and they are then entitled to receive from him a certificate of provisional registration. They must continue to make returns of the provisional place of business and description of the

v. Duke of Argyle, 6 Q. B. 477, E. C. L. R. vol. 51; *Wood v. Duke of Argyle*, 6 M. & Gr. 928, E. C. L. R. vol. 46; *Hutton v. Thompson*, 3 H. of L. Cas. 161.

(*d*) *Barnett v. Lambert*, 15 M. & W. 489.

committee promoting the company, with a written consent of every member or promoter to become such, and an agreement signed by him to take one or more shares as soon as practicable. They must state the amount of the proposed capital, and the amount and number of shares, and afterwards of every change in these particulars. This certificate continues in force for twelve months, but may be renewed. During such period the promoters may assume the name of the company, open subscription lists, allot shares, and receive deposits, not exceeding 10s. in every 100l. But they may not make calls, nor purchase nor contract for lands, or for services, or works, or stores, other than such services, works, or stores necessarily required for establishing the company. Every contract must be made conditional, and to *take effect after the certificate of complete re- [*279] gistration, hereafter mentioned, under a penalty of 20l. But companies requiring an Act of Parliament may contract for surveys and other things necessary for obtaining it. Before obtaining a certificate of complete registration, the company must be formed by a deed of settlement, under the hands as well as seals, of the shareholders. The requisite contents of this deed are minutely pointed out in the statute. It must contain a covenant by every shareholder with a trustee, and it must set forth the business and purpose of the company. Before it can be registered it must be signed by one-fourth of the subscribers, who were such at the date of it, and who must hold one-fourth of the greatest number of shares. Upon the production of this deed the registrar grants a certificate of complete registration, and thereupon the company becomes incorporated. Many other particulars are required by the statutes, but these seem to be sufficient for our present purpose. From this time the company obtains its corporate name,

which it cannot change^(e)—may carry on the business for which it is formed, and use its property and effects; and any engagements entered into before complete registration with its trustees may be enforced by the company. The company has a common seal, inscribed with its corporate name—may sue and be sued by its [*280] registered name in *respect of any claim by or upon it, upon or by any person, whether member of it or not—may contract for any proper purpose of the company—may purchase real property with license of the Board of Trade, issue certificates of shares, receive instalments from subscribers, borrow money according to the deed, and perform all other acts for carrying into effect the purposes of the company, as other partnerships may do. Power is given to the directors to conduct the affairs of the company according to the deed, and, in so doing, to enter into all such contracts as circumstances may require, and appoint officers and servants. But if any director be interested in any contract to be made on behalf of the company, he must not act as a director therein.

[We see, therefore, that companies established under the 7 & 8 Vict. c. 110, may by their registered name sue their members, or be sued by them, thus being in the condition of members of an ordinary corporation, who are in law entirely distinct from the corporation of which they are members. But in suing the members for calls, as their liability must depend upon the deed or special Act of Parliament, the power of the directors to make them is a specific power, and must be strictly pursued.^(f) But, in the absence of prohibitory words,

^(e) *R. v. Registrar of Joint Stock Companies*, 10 Q. B. 839, E. C. L. R. vol. 59.

^(f) *Moore v. Hammond*, 6 B. & C. 456, E. C. L. R. vol. 13; *Meigh v. Clinton*, 11 A. & E. 418, E. C. L. R. vol. 39; *Aylesbury*

the calls may be made payable by *instalments, [*281] or at a future time, which time and mode of payment may be fixed subsequently to the making of the call. (g) Before complete registration no subscriber may sell his shares. After complete registration he is at liberty to do so; but it must be by deed duly stamped, and subject to the regulations in the deed of settlement and special Act. But he is not at liberty to sell his shares till he has paid the full amount due on every share held by him. (h) A memorial of the transfer must be entered in a register, and until this is done the purchaser cannot receive any profits, and the vendor continues liable to the company's engagements, and even to calls. (i)

[It may be worth while to mention here that shares in a joint stock company, although it be seised of land and possessed of goods as well as of the property in which it commonly deals, do not fall within the 4th section of the Statute of Frauds (k) as an interest in land, or within the 17th section (l) as goods, wares, or merchandise; but, in the absence of any enactment making them the one or the other, are personal property and mere choses in action, and consequently are *transferable by parol. (l) But in fact the [*282] general statute, 7 & 8 Vict. c. 110, prescribes

Railway Co. v. Mount, 4 M. & Gr. 651, E. C. L. R. vol. 43, 7 Id. 898.

(g) Ambergate, Nottingham, and Boston Railway Co. v. Coulthard, 5 Exch. 459, 6 Id. 629; North Western Railway Co. v. M'Michael, 6 Exch. 273.

(h) Hall v. Norfolk Estuary Co. 21 L. J. (Q. B.) 94.

(i) Sayles v. Blane, 19 L. J. (Q. B.) 19, 14 Q. B. 205, E. C. L. R. vol. 68, S. C.

(k) Humble v. Mitchell, 11 A. & E. 205, E. C. L. R. vol. 39; Tempest v. Kilner, 3 C. B. 249; Bowlby v. Bell, Id. 284, supra, p. 74. (l) Hibblewhite v. M'Morine, 6 M. & W. 214.

the mode in which, under the operation of that statute, such shares may be granted by the company and transferred from holder to holder; and various modes for attaining these purposes are prescribed in the particular Acts regulating many of the companies which were established before that enactment.

[If the approbation of the directors be required as a preliminary to the transfer, it must of course be procured,^(m) and that by the vendor, who must do everything necessary to vest the property in the purchaser,⁽ⁿ⁾ although it is generally for the purchaser to prepare and tender the conveyance.^(o) And therefore, when the shares are by the provisions of an Act of Parliament transferable by deed only, the purchaser must tender a deed to the seller for execution before he can sue for not transferring them; and a sealed instrument of transfer, having the name of the vendee in blank at the time when it is sealed and delivered, is invalid, not being a legal deed.^(p)

[When a person has become a member of a joint stock company, he is in all ordinary cases entitled [*283] *to the benefits of all its contracts, and responsible for the engagements of the company made by the agents of the concern in order to carry out its purposes.^(q) But, in order to charge the company or any member upon a contract, it must be proved to have been made by persons having authority from all the shareholders to bind them by such a contract; and this may be done by proving that it was sanctioned by the persons authorized by the deed of the company to con-

(m) *Bosanquet v. Shortridge*, 20 L. J. (Exch.) 57; 4 Exch. 699, S. C.

(n) *Ibid.* *Wilkinson v. Lloyd*, 7 Q. B. 27, E. C. L. R. vol. 53.

(o) *Stephens v. De Medina*, 4 Q. B. 422, E. C. L. R. vol. 45.

(p) *Hibblewhite v. M' Morine*, *supra*.

(q) *Harvey v. Kay*, 9 B. & C. 356, E. C. L. R. vol. 17.

duct its affairs.^(r) But the claimant is not confined to the deed for proof of authority. He may show in any way that the whole of the shareholders have directly or indirectly given authority to those making the contract to bind them; but to show merely that some of the directors have ordered or approved of the contract is not sufficient without also showing, that, by the deed or otherwise, they were authorized so to do. Therefore, where the deed appointed eleven directors, and declared five to be a quorum, the company was held not bound by a contract made at a board where three only were present: and this although the company was completely registered under 7 & 8 Vict. c. 110.^(r) And, on the other hand, where a manufacturing company had appointed a manager to superintend and transact its manufacturing business, but the *general business was to be transacted by a board of directors, who had power to [*284] appoint officers and delegate their authority, and goods for the manufacture had been ordered by the manager, the chairman, the deputy-chairman, and the secretary, which were used for the company's purposes; the Court of Common Pleas considered, that, although, with the exception of the manager, none of these officers had authority to give such orders, and although the directors did not expressly adopt them, yet, as they knew they had been so furnished, the company was liable.^(s)

[It will probably appear quite clear from what has been said before, and if not it is sufficiently so from the very nature of the thing, that the contracts to

^(r) *Ridley v. Plymouth Baking Co.* 17 L. J. (Exch.) 252; 2 Exch. 711, S. C.

^(s) *Smith v. Hull Glass Co.* 21 L. J. (C. P.) 106, 11 C. B. 897, E. C. L. R. vol. 73.

which a member of a joint stock company becomes liable, because they are made by the agents of the company or certain of its members, must be contracts, either expressly authorized by him, or appropriate, in order to carry out the purposes for which the company was formed. Thus, in the celebrated case of *Dickenson v. Valpy*,^(t) which was an action on a bill of exchange, purporting to be drawn and accepted by a mining company, wherein the plaintiff, an indorsee for value, sought to charge the defendant as a member of that company, the Court of Queen's Bench held, that, [*285] assuming the *defendant to be a member of that company, it was incumbent on the plaintiff to prove that the directors of the company had authority to bind the other members, by drawing and accepting bills of exchange; and that the plaintiff, not having produced the deed of copartnership, nor given any evidence to show that it was necessary for the purpose of carrying on the business of a mining company, or that it was usual for them to draw or accept bills of exchange; there was no evidence of such authority to draw or accept bills of exchange. "There was not any evidence," said Parke, J., now Parke, B., "to prove an authority of the parties in this concern to draw such a bill of exchange as this. I very much doubt whether there is any authority in mining companies, arising by implication from the nature of their dealings, to draw or accept bills of exchange; and it is to be observed, that there was no proof of any usage to do this in such companies. The argument would go to this, that all persons who deal in the produce of the land, which they jointly occupy, because they might sell that produce at a distance, would have an implied power given to each other to draw bills of ex-

(t) 10 B. & C. 128, E. C. L. R. vol. 21.

change for the purpose of receiving payment for it; if the argument was valid, it would show that farmers acting in partnership, as well as miners, would have, as incidental to the relation of partners, an authority to draw bills of exchange *upon the persons [*286] to whom the produce of the land was sold; there is, however, no necessity to decide that point, because there is no ground at all events, to say, that mining partners have an implied authority from one another, arising from the nature of their business, to draw such a bill of exchange as this; for, upon the face of it, this is a bill drawn by the company upon themselves, and though it is in form treated as a bill of exchange, it is in substance only a promissory note; and the effect of saying that one member of a company like this can draw such bills or notes, would be that each of the partners in the concern would have the power of pledging the others." Still more general was the language of Tindal, C. J., in delivering the judgment of the Court of Common Pleas in the case of *Bramah v. Roberts*.^(u) In that case a bill had been drawn by one of the directors of a gas company on himself and the other directors, which was accepted by the chairman for himself and the other directors. This acceptance was held not to bind them. It has been decided, that, in the absence of proof to the contrary, one member of a joint stock company cannot bind the remainder by negotiable instruments. "The address of a bill," said the Chief Justice, "to the directors of a metropolitan company, and the frame of acceptance by the chairman [*287] *of such directors, for himself and the other directors, can only be referable, unless some explanation is given, to a company of the description well known in all the Courts of law and equity in West-

(u) 3 Bing. N. C. 963, E. C. L. R. vol. 32.

minster Hall as joint stock companies, and not to ordinary partnerships in trade. It was proved upon the trial of the cause, that Clare, the drawer of the bill, from whom the plaintiffs derived title, and upon whose indorsement they rely, was the same William Clare who is one of the acceptors and one of the defendants in his capacity of acceptor. So that the bill is drawn by one of the directors upon himself and the other directors, payable to his own order, and accepted by another director for himself and the rest. But the right of one director to draw a bill upon the rest, and still further, the power of one director to accept a bill for himself and the others, so as to make those others liable, according to the case of *Dickenson v. Valpy*,^(v) in the authority of which case we entirely concur, is not a right or power implied by law, like that which belongs to one member of an ordinary partnership in trade with respect to bills drawn and accepted for the purposes of the trade. It must depend upon the powers given by the charter, or deed or agreement under which the company is established and constituted, or some other agreement between the parties, [*288] whether *a bill so drawn and accepted shall or shall not have that legal effect. But, upon the trial of this cause, no evidence whatever was given by the plaintiffs of the constitution of this company, nor of any authority given, by deed or otherwise, to any one of the directors to bind the other directors, or to bind the company at large, by his acceptance of bills of exchange; and in the absence of such evidence, we are of opinion that no such authority is to be implied by law, or can be held to exist."

[With regard to the borrowing of money, unless it be part of the ordinary business of the company, as it

(v) 10 B. & C. 128, E. C. L. R. vol. 21.

would be of a banking company, (x) or express powers be given them by the deed, the directors have no authority to pledge the credit of the shareholders by borrowing money, even though it be necessary to enable them to carry on the affairs of the company. (y) It has since been held, that, even where a clause in the deed of settlement, under which a mining company was carried on, provided that the affairs and business of the company should be under the sole and entire control of the directors, of whom there should be not less than five nor more than nine, and that three of them should at all meetings of directors, and for all purposes, be competent to act, did not authorize them to borrow money for the necessary purposes *of the mines. (z) As to dealing on [289] credit, the question, whether the company may be made liable by its agents so dealing, depends, like the others we have been considering, upon the authority given to those agents; and this authority, as in other cases, may be proved by showing it to have been actually given, or that concerns of the nature in question are ordinarily so carried on. "The question," said Lord Abinger, "which was decided in *Dickenson v. Valpy*, that a mining company is not necessarily formed with a power to pledge the credit of individual members by the drawing of bills, is very different from the question, whether it is not formed with power to bind them by dealing on credit; whether the directors have such a power, must depend on the general nature of the concern; it is a matter for the jury to decide upon, unless the party gives evidence to show that their authority was expressly limited; and

(x) *Bank of Australasia v. Breillat*, 6 Moore P. C. C. 152.

(y) *Ricketts v. Bennett*, 4 C. B. 686, E. C. L. R. vol. 56.

(z) *Burmester v. Norris*, 21 L. J. (Exch.) 43, 6 Exch. 796, S. C.

if it had been left to the jury in this case, I think they would not have had much difficulty in saying that it is in the general nature of mining concerns to deal on credit for the purpose of carrying on their business.”(a) This distinction between borrowing and dealing on credit has been upheld by the Court of Chancery.(b)

[*290] * [The form and mode in which joint stock companies established under the 7 & 8 Vict. c. 110, ought regularly to enter into contracts, have been alluded to slightly before, but it is necessary to state them more particularly, because, as you will no doubt perceive, they have been prescribed for the purpose of avoiding many of those difficulties which have arisen as to the rights and liabilities of corporations upon their contracts. By sect. 44, it is enacted, that except as to contracts for the purchase of any article not exceeding 50*l.*, or for any service not exceeding six months for a consideration not exceeding 50*l.*, and except bills and notes, every such contract shall be in writing, and signed by two at least of the directors of the company on whose behalf the same shall be entered into, and shall be sealed with the common seal of the company, or signed by some officer of the company on its behalf, to be thereunto expressly authorized by some minute or resolution of the board of directors applying to the particular case; and that, in the absence of such requisites or any of them, any such contracts shall be void, except as against the company on whose behalf it shall have been made. It is also enacted, that every contract for the purchase of any article not exceeding 50*l.*, or for any

(a) *Tredwen v. Bourne*, 6 M. & W. 465; *Hawken v. Bourne*, 8 M. & W. 703.

(b) *In re The German Mining Co.* 22 L. J. (Chanc.) 926.

service not exceeding six months for a consideration not exceeding 50%, may be entered into by any officers authorized by a general by-law. And if the directors *be authorized by the deed or by- [291] law to issue or accept bills or notes, such bills or notes shall be made or accepted by and in the names of two of the directors, and shall be by such directors expressed to be made or accepted by them on behalf of the company, and shall be countersigned by the secretary or other appointed officer; and every bill made and received by or on behalf of the company may be indorsed in its name by the officer appointed by the deed or by-law so to do. It is also provided, that all instruments bearing the seal of the company shall be signed by two of the directors.(c) It will be observed that these provisions apply to contracts made on behalf of the company. It seems, therefore, that in every case in which a company makes a contract to do something, in consideration of which something else is to be done by the other contracting party, then the contract is to be made in the manner pointed out by the Act. If not so made, the company will be bound, but not the other party:(d) in other words, the company cannot enforce such a contract. But, as we have seen, the company may be liable upon the contract, however it may vary from the regulations prescribed by the statute, provided the contract is authorized by the deed of settlement, or can be shown in any way to have been sanctioned by the *shareholders.(e) [292] But if the statutory form is not followed, nor

(c) Sect. 46.

(d) *British Empire Ass. Co. v. Browne*, 22 L. J. (C. P.) 51, 12 C. B. 723, S. C. E. C. L. R. vol. 74.

(e) *Gleadow v. The Hull Glass Co.* Shadwell, V. C. 19 L. J. (Chanc.) 44; *Bosanquet v. Shortridge*, 4 Exch. 699, *supra*.

that prescribed by the deed of settlement, and the contract has not been sanctioned by the shareholders, they will not be bound by it.(f) As to bills and notes, it has been seen that they are to be made or accepted by and in the names of two directors, and shall be expressed by such directors to be made or accepted by them on behalf of the company. As this is an important requirement, it is necessary to notice that there has been a difference of opinion between the Court of Queen's Bench and the Court of Exchequer as to what is a sufficient compliance with it. In one case,(g) where the form of acceptance was "Accepted by J. B. and E. N., Directors of Cameron's Colebrook, &c., Company, appointed to accept this bill," and the bill was directed to the company by their corporate name, and sealed with the corporate seal, which had the name of the company circumscribed, and the acceptance was countersigned by the secretary of the company, describing himself as such: the Court of Queen's Bench thought this acceptance a sufficient compliance with the statute. "Can it be reasonably contended," said Lord Campbell, C. J., "that this bill [*293] is not by such directors *expressed to be accepted by them on behalf of such company?—By whom are they represented to be appointed to accept the bill? Unquestionably by the company, who are the drawees. Do not the directors represent that they act under that appointment? Is not this a representation by them that the bill is accepted by them on behalf of the company?" On the other hand, where the form of acceptance was as follows:(h)

(f) *Kirk v. Bell*, 16 Q. B. 290, E. C. L. R. vol. 71; *Ridley v. Plymouth Baking Co.* 2 Exch. 711.

(g) *Halford v. Cameron's Colebrook R. Co.* 16 Q. B. 442, E. C. L. R. vol. 71.

(h) *Edwards v. Cameron's Colebrook R. Co.* 6 Exch. 269.

“Accepted. J. B. and E. N., directors of Cameron’s Colebrook, &c., appointed by resolution to accept this bill;” and the bill had been drawn upon the company by their corporate name, and sealed with the corporate seal having their name inscribed, and the acceptance was countersigned by the secretary, it was objected that the acceptance was not sufficient according to the statute. “It is admitted,” said Parke, B., “that the case in the Court of Queen’s Bench is precisely in point; and if we were to make this rule absolute we should in effect overrule that decision. I own that I have great difficulty in coming to the conclusion that this acceptance does comply with the statutory requisites, for the Act requires that the instrument shall be by such directors expressed to be made or accepted by them on behalf of such company. There is not a word of that kind upon the face of this instrument. Now, it appears to me, that, in order *to bind the company, and to free the [*294] directors from all personal liabilities upon these acceptances, it ought to appear that the directors, &c., do the act as the mere agents of the company, and not on their own account.” The rest of the Court intimated their dissent from the Court of Queen’s Bench; but considered it an instance in which they ought to follow an authority precisely in point, reserving their own opinions for a Court of Error.

[It will be observed, that, although the individual members of corporations are not liable upon its contracts, members of joint stock companies have not the same freedom from liability. As to their liability, the Joint Stock Companies Act, so often referred to, 7 & 8 Vict. c. 110, contains many special provisions, that judgments, decrees, or orders obtained against any company

completely registered may be enforced not only against the property and effects of the company, but also, if due diligence shall have been used to obtain satisfaction against the company without effect, then against the person, property, and effects of any shareholder for the time being, or any former shareholder, provided that the latter was a shareholder at the time when the contract, for which such judgment, decree, or order may have been obtained, was entered into, or became a shareholder during the time it was unexecuted or unsatisfied, or was a shareholder at the time of the judgment, [*295] *decree, or order being obtained. But he will not be liable to have execution issued against him after three years from his ceasing to be a shareholder; nor will any person be liable at all if he is not properly speaking a shareholder—as where the shares have not been regularly or properly transferred to him.⁽ⁱ⁾ But you will clearly deduce from what has been said, that, if, as is usual in contracts of assurance and some others, the contract between the claimant and the company stipulates that the individual proprietors shall not be liable, and that the funds of the company alone shall be had recourse to, the individual proprietor must be quite free.^(k) The shareholder, however, who has been thus obliged to pay, may recover against the company his losses and costs by reason of execution against him; and, if he cannot obtain satisfaction against the company, may recover contribution from the other shareholders, as in ordinary cases of partnership.^(l)

(i) *Ness v. Angas*, 3 Exch. 805; *Ness v. Armstrong*, 4 Exch. 21; *Dodgson v. Bell*, 20 L. J. (Exch.) 137; 5 Exch. 967, S. C.

(k) *Halkett v. Merchant Traders Insurance Association*, 13 Q. B. 960, E. C. L. R. vol. 66; *Hassell v. The same*, 4 Exch. 525.

(l) Sect. 67.

[These are the chief rules and decisions respecting the peculiarities of the contracts of joint stock companies, which approach to the nature of general principles ; but it is impossible to understand *the [*296] subject without a careful study of the statutes which have been here mentioned, and of the decisions by which those statutes have been applied. It has come to be one of the largest classes of the law of England. It cannot be said to have yet assumed a certain, well-defined, and satisfactory form, but it is hoped that the foregoing slight sketch will give the student some advantage in entering upon the study of the statutes and decisions. He is strongly recommended to study the latter always, in the view of their being illustrations and applications of the former. By keeping the terms of the former in his mind, the latter will appear to have a consistency and clearness which they will not otherwise be supposed to possess, and he will be enabled to apply the statutes to new cases with an accuracy and facility not to be acquired otherwise. In undertaking this labor, he will find it much facilitated by taking as his guide to the decisions the chapter on Joint Stock Companies in the last edition of Smith's Mercantile Law, by Mr. Dowdeswell, where the statutes are abridged and the leading decisions arranged with singular fulness, clearness, and brevity.]

[As to joint stock banking companies, the liabilities of individual members are very similar to those we have already mentioned ; and, their liabilities under the Lands Clauses Act and Railways Clauses Act are for the most part the same, subject to *some peculiar [*297] regulations suitable to the object of incorporation : but they do not fall within the scope of these Lectures.]

I have now specified the various classes of parties

with regard to whose competency to enter into contracts I had any particular observations to make, and now, assuming that none of the various cases of disability which I have mentioned arises, but that the parties entering into the contract are competent by law to do so, there remains one other very important subject to advert to, namely, the mode in which they may become parties to the contract. And this must be in one of two ways: either personally or by the intervention of an agent.

There are few branches, perhaps no branch of the law of England, to which it becomes so often necessary to refer as that which regulates the rights of parties under contracts made by agents. The truth is, that as society is now constituted, the business of life has become so complicated, that "no man's individual efforts can embrace all the subjects with which he is called on to deal." Hence we are obliged to transact a variety of business and enter into a variety of engagements through the medium of agents, the precise effect of whose acts in binding or advantaging us becomes of course a matter of the utmost practical importance. I cannot, however, attempt to do more than [*298] state the general principles by which *the subject (so far as it relates to contracts) is regulated.

Generally speaking, whatever contract a man may enter into in his own person, he may, if he think fit, appoint an agent to enter into in his behalf. There are, indeed, one or two exceptions to this rule, which arise out of the wording of certain Acts of Parliament, requiring the intervention of the principal party himself in certain contracts. For instance, a man cannot appoint an agent to sign a writing for the purpose of exempting a case from the operation of the Statute of

Limitations.(m) [Nor can a person who objects to the name of a person being retained upon the list of voters in a parliamentary borough, empower another to sign the objection for him.(n) In the former of these cases, the statute 9 Geo. 4, c. 14, requires the writing to be signed by the party chargeable thereby; and in the latter, the 6 & 7 Vict. c. 18, s. 100, requires every notice of objection to be signed by the person objecting.]

But, generally speaking, whatever contract a man may lawfully enter into himself, he may appoint an agent to enter into for him. [There is, however, another extensive and important exception to this rule, which takes place when a man is himself an agent.(o) He cannot, in this instance, appoint *an agent [*299] to transact the matters of his own agency.

The exception evidently arises from the very nature of the agent's own appointment; for it is one thing to trust a man's discretion to transact your affairs, and for which you may know him to be quite competent, but altogether another and a different thing to trust his discretion to select a stranger to transact your affairs at your responsibility. The maxims of law, therefore, are—*Delegatus non potest delegare*, and *Vicarius non habet vicarium*,—maxims which it is obvious are necessary for the principal's protection, but which, it is clear, cannot apply where you expressly give your agent power to appoint a deputy.(p)] Now the considerations on which I shall have occasion to touch relate to one of four points into which what I have to

(m) Hyde v. Johnson, 2 Bing. N. C. 776, E. C. L. R. vol. 29.

(n) Toms, App.; Cuming, Resp. 7 M. & Gr. 88, E. C. L. R. vol. 49.

(o) Combe's case, 9 Co. 76 b; Cobb v. Becke, 6 Q. B. 936, E. C. L. R. vol. 51; Cockran v. Islam, 2 M. & Selw. 301, n.

(p) Moon v. Whitney Union, 3 Bing. N. C. 817; E. C. L. R. vol. 32; Lord v. Hall, 8 C. B. 627, E. C. L. R. vol. 65.

say on this subject may be conveniently enough distributed ; and they relate to the questions :—

1. WHO MAY BE AN AGENT.
2. HOW AN AGENT IS APPOINTED.
3. HOW FAR HIS CONTRACTS BIND HIS PRINCIPAL.
4. HOW FAR THE PRINCIPAL MAY BE ADVANTAGED BY THEM.

Now, with regard to the *first* point, namely, *who* is competent to be an agent, I have to observe, that it by no means follows that a person who is not competent ^{to} contract himself, is therefore not *competent to contract as agent for another person ; thus it has been decided that an infant may be an agent, or even a married woman, though she could not have contracted in her own right. [Thus, where a married woman kept a school at which the defendant had placed his daughter, and drew upon him a bill for the expenses of the daughter's education, which bill she indorsed to the plaintiff, and the drawing and indorsing of the bill were both in the wife's name, but with the husband's assent, and he also obtained the value of the bill from the plaintiff, it was considered that there was ample evidence of the husband having authorized the drawing and indorsing of the bill, and that there was nothing to prevent his making his wife his agent for that purpose. (q)¹ In a very similar case, where a wife accepted in her own name a bill drawn upon her husband, and his authority was proved, he was held liable. To the objection that a drawee cannot bind himself otherwise than by writing his own name on the bill, which you are no doubt aware is the general practice

(q) *Prestwick v. Marshall*, 7 Bing. 565 ; E. C. L. R. vol. 20 ; *Prince v. Brunatte*, 1 Bing. N. C. 435, E. C. L. R. vol. 27.

¹ *Hopkins v. Mollineux*, 4 Wend. 465.—R.

in accepting bills, it was asked, would he not be liable if, with his own hand, he had accepted the bill by writing another name across? The only difference was, that he had done so by the hand of his wife. Had he done it with his own hand, it clearly would have been his *own acceptance, and the Court *[301] held that there was no rule of law which made such an authority void. Nobody but the defendant could have accepted the bill so as to bind, and he accepted it by the hand and in the name of his wife. (r) Few persons, says Lord Coke, are disabled to be private attorneys to deliver seisin, for monks, infants, femes covert, persons attainted, outlawed, excommunicated villains, aliens may be attorneys.¹ It is hardly necessary to say that the attorney mentioned here is the agent properly authorized for the purpose required. It will be obvious, that the general reason why persons incapacitated to contract may, notwithstanding their incapacity, act as agents in the contracts of others, is that their incapacity is personal, and that such contracts are not their own, but the contracts of those whose agents they are.]

But it is held, that, upon the peculiar wording of the Statute of Frauds, one of two parties entering into a contract, such as we have seen that Act requires should be in writing, cannot be agent for the other, even with that other's consent, so as to bind him by his signature to such a writing. (s) [Thus, where the plaintiff, an auctioneer, sued the defendant for not paying for goods purchased by him, and, the goods not having been delivered, the only evidence of the

(r) *Lindus v. Bradwell*, 5 C. B. 583, E. C. L. R. vol. 57.

(s) *Wright v. Dannah*, 2 Camp. 203; *Farebrother v. Simmons*, 5 B. & Ald. 333, E. C. L. R. vol. 7.

¹ A slave may be an agent: *The Governor v. Daily*, 14 Alabama, 469.

[*302] contract was the book kept by the *plaintiff as an auctioneer, in which he had duly entered the different biddings opposite the lots; the Court of King's Bench held, that, although in general an auctioneer may be considered as the agent and witness of both parties, the vendor and the purchaser, yet when he elects, as he may do, to be himself as one of the contracting parties, the agent who is to bind a defendant by his signature must be some third person, and not one of the contracting parties on the record. To allow it, indeed, would seem to amount to a direct dispensation with the signature of the party to be bound, which, whether by his own or his agent's hand, the statute requires. But it seems to be no violation of this requirement,—the hand of the agent or of the principal,—that the agent of the one party should act as the agent of the other, although, of course, in such a case clear evidence would be required to show his authority, constituting him the agent of the latter. Thus, in an action by an auctioneer against a purchaser of goods sold by auction, the entry in the auctioneer's sale book made by the auctioneer's clerk who was assisting at the sale, and as each lot was knocked down named the purchaser aloud, and on assent from him made an entry of the sale to him, is a sufficient memorandum within the 17th section of the Statute of Frauds, the clerk being, in the first instance, the agent of the auctioneer, and constituted the agent of the purchaser by the assent of the latter, [*303] when told by the clerk that the lot was *knocked down to him.(t) But where the traveller of a wholesale dealer, calling on a shop-keeper to sell his principal's goods, and having by parol sold him certain sugar, was desired by the

(t) Bird v. Boulter, 4 B. & Ad. 443, E. C. L. R. vol. 24.

latter to make in his (the shopkeeper's) book a memorandum of the transaction, and thereupon made the following, "Of North & Co., 30 mats Maurs. at 71s., cash 2 months, Fenning's wharf," and signed it with his own name; the sugar having been destroyed before it was delivered, it became necessary to prove the sale by a written memorandum; but these facts were held insufficient to show that the traveller was constituted the agent of the shopkeeper to bind him under the statute.^(u) Indeed, it seems clear, as observed in the case, that the signing of the entry in the defendant's book would tend to make it obligatory on the plaintiff rather than on the defendant.]

With regard to the second point, namely, in what manner an agent is to be appointed:—Whenever there is no particular rule of law or special statutory provision pointing out a particular mode of appointment, he may be appointed even by bare words. But there are some cases in which the common or statute law *does* require a particular mode of appointment; for instance, it is a rule of common law, that an agent who is to contract for *his principal by deed, [*304] must himself be appointed by deed.^(x)¹

Again, a corporation, as it can, generally speaking, do

(u) *Graham v. Musson*, 5 Bing. N. C. 603; E. C. L. R. vol. 35; *Graham v. Fretwell*, 3 M. & Gr. 368, E. C. L. R. vol. 42.

(x) *Harrison v. Jackson*, 7 T. R. 209.

¹ *M'Murty v. Frank*, 4 Monroe, 39; *Cummings v. Cassily*, 5 B. Monroe, 74; *Boyd v. Dodson*, 5 Humph. 37; *Bragg v. Fessenden*, 11 Illinois, 545; *Damon v. Granby*, 2 Pick. 352; *Blood v. Goodrich*, 12 Wendell, 525; *Wells v. Evans*, 20 Id. 258; *Rhode v. Louthain*, 8 Blackf. 413. Perhaps the most important, as well as frequently recurring cases to which this common law rule applies, are those of contracts under seal made by one member of a partnership without authority under seal from the other.—R.

no act except by deed; so it cannot, generally speaking, appoint an agent in any other way. There are, indeed, one or two exceptions to this, as to the rule which obliges them to contract by deed, particularly in the cases of trading companies. You will find the rule and the exceptions discussed in *Dunston v. Imperial Gas Light Company*.(y) With regard to the case of a statute requiring a particular mode of appointment, you may take, for example, the Statute of Frauds, the 1st, 2d, and 3d sections of which require, in express terms, that the agent who is to do any of the acts mentioned in those sections shall be appointed by writing, whereas the 4th and 17th sections contain no such provision. [The consequence, of course, is, that in cases within these latter sections the agent's authority need not be in writing.(z)]

With regard to the third point, namely, in what cases the principal is bound by his agent's contract:— It is, of course, obvious at first sight, that, so far as the agent's authority extends, his principal is bound by all acts done in pursuance of that authority. So far, there can be no doubt or difficulty whatever. But [*305] the cases in which doubts *and difficulties arise, are those in which the agent has gone beyond his authority, has made some contract which his instructions do not authorize; and then the question arises whether his principal shall or shall not be bound by it. Now, in order to solve this question, it is necessary, in the first instance, to understand the distinction between *general* and *particular* agency. A general agent is an agent intrusted with all his principal's business in some specific line, of some specific kind. A particular agent is an agent employed specially for some one special purpose. For instance, if

(y) 3 B. & Ad. 125, E. C. L. R. vol. 23.

(z) *Emmerson v. Heelis*, 2 Taunt. 46.

I intrust another with the sale of a particular horse, of which I am desirous of disposing, he is a *particular* agent to transact that particular business. But if I appoint an agent to sell all my horses, and consign horses to him from time to time for sale, he is my *general* agent in that line of business. Now, there is this important distinction between contracts made by general, and those made by particular agents, namely, that, if a particular agent exceed his authority, his principal is not bound by what he does;¹ whereas, if a general

¹ Thus, in *Batty v. Carswell*, 2 Johns. 48, where one who was authorized to sign a note for another for \$250, payable in six months, signed one payable in sixty days, it was held that the principal was not liable, because the authority, which was a special one, was not strictly pursued. So, a clerk in a retail store has no authority to sell by wholesale, or to deliver goods in payment of, or security for debts: *Beals v. Allen*, 18 Johns. 362; *Hampton v. Matthews*, 2 Harris, 107. So, a clerk employed to do outdoor business of a merchant, such as to negotiate purchases and charter-parties, present bills of lading for signature, &c., has no authority to pledge these bills of lading, or receive advances on them: *Zachrisson v. Ahman*, 2 Sandf. S. C. 68. So, one employed by a merchant to purchase goods, give notes, and do all other things in his business as merchant, will not authorize the mortgage of goods in the merchant's store: *Reeves v. Baldwin*, 1 Smith (Ill.), 170. So, one having authority to collect a note, has none to take a sealed note for the amount, and there will be no merger of the original debt: *M'Culloch v. M'Kee*, 4 Harris, 289. So, if a shopman authorized to receive money over the counter only, receives it elsewhere than in the shop, the payment is not good: *Kaye v. Brett*, 5 Excheq. 273. Other instances of the application of this familiar rule may be found in *Andrews v. Kneeland*, 6 Cowen, 354; *Thompson v. Stewart*, 3 Connect. 171; *Snow v. Perry*, 9 Pick. 542; *Lobdell v. Baker*, 1 Metcalf, 201; *Huntingdon v. Wilde*, 6 Vermont, 234; *Brown v. Billings*, 22 Id. 128; *Gordon v. Buchanan*, 5 Yerger, 71; *Bk. of Hamburg v. Johnson*, 3 Richardson, 42; *Carter v. Taylor*, 6 Smedes & Marsh. 367; *Shriver v. Stevens*, 2 Jones, 258; *Scott v. M'Grath*, 7 Barbour's S. C. R. 53; *Paige v. Stone*, 10 Met. 160.—R.

Taylor v. Labeaume, 14 Missouri, 572; *Nash v. Drew*, 5 Cushing,

agent exceed his authority, his principal is bound, provided what he does is within the ordinary and usual scope of the business he is deputed to transact. For instance, if I employ *A.* to carry a bale of cottons from Manchester to Liverpool, and he sells them, I am not bound by the sale, but may bring an action of trover [*306] for them against the *purchaser; whereas, had I intrusted them to my factor for the same purpose, I should have been bound by the sale, that being a transaction within the ordinary scope of his business as factor.¹

422; *The Methuen Co. v. Hayes*, 33 Maine, 169; *Bailey v. Rawley*, 1 Swan, 295; *Kirk v. Hiatt*, 2 Carter, 322; *Towle v. Leavitt*, 3 Foster, 360; *Huber v. Zimmerman*, 21 Alabama, 488.

¹ A factor is a general, not a special agent, intrusted with the possession, disposal, and apparent ownership of property; and having a general power to sell, he may do so for cash or on credit, and receive in payment notes or any kind of property. Notwithstanding this general authority, it was, however, held in England, in the case of *Patterson v. Tash*, 2 Strange, 1178, that "a factor cannot bind or affect the property of the goods by pledging them as a security for his own debt, though there may be the formality of a bill of parcels and a receipt," and this decision has been followed, though with occasional reluctance, by numerous cases: *Daubigny v. Duval*, 5 Term, 604; *Martini v. Coles*, 1 Mau. & Sel. 140, 493; *Graham v. Dyster*, 6 Id. 1, 14; *Queiroz v. Trueman*, 3 Barn. & Cress. 342; *Fielding v. Kymer*, 2 Brod. & Bing. 639. Such is recognized as the rule on this side of the Atlantic, unless where it has been altered by statute: *Van Amringe v. Peabody*, 1 Mason, 440; *Kinder v. Shaw*, 2 Mass. 398; *Odiorne v. Maxey*, 13 Id. 178; *Hoffman v. Noble*, 6 Metcalf, 74; *Holton v. Smith*, 7 New Hamp. 446; *Newbold v. Wright*, 4 Rawle, 195; *Kennedy v. Strong*, 14 Johnson, 128; *Hewes v. Doddridge*, 1 Robinson, 143. It has, however, been held that although a factor has not authority to pledge, yet that he can, in the usual course of mercantile dealing, deliver for sale to a broker, auctioneer, &c., the goods intrusted to him, and receive money upon them as an advance, and the deposit will bind the principal, who cannot recover them in trover: *Martini v. Coles*, *supra*; *Laussatt v.*

[The case of *Whitehead v. Tuckett*(a) affords another very good illustration of the rule, that, although the express instructions are exceeded, yet, if what he does is within the usual scope of the business he is deputed to transact, the agent binds his principal by so doing. In that case, *Sill & Co.*, who were brokers at Liverpool, were employed by the defendant, a wholesale grocer at Bristol, to buy and sell on his account great quantities of sugar. The greater part was bought on speculation for re-sale, and was re-sold at Liverpool; but some was occasionally sent to the defendant. *Sill & Co.* usually bought and paid for the sugar, and re-sold and received the price in their own names. They did not draw upon the defendant for the amount of each purchase, nor remit him the bill in payment of each sale; but there was a general running account between them. *Sill & Co.* never had a general authority to buy, but in each instance received directions; but sometimes, when the markets were low, had unlimited authority as to the quantity they were to buy, or the price they were to pay. In like manner, they had no general authority to sell, but received directions on *each occasion. It [*307] was held, that they might bind their principal by a re-sale of a particular parcel of sugar before purchased and paid for in their own names and lodged in

(a) 15 East, 400.

Lippincott, 6 Serg. & Rawle, 386; *Martin v. Moulton*, 8 N. Hamp. 504; *Bowie v. Napier*, 1 M'Cord, 1.

But the rule thus established by *Patterson v. Tash*, having been thought to impose undue restrictions upon the facilities of commercial dealing, has been altered by the acts of Parliament referred to by the English editor, *supra*, which have been copied with more or less exactness in New York, Pennsylvania, Rhode Island, Ohio, Massachusetts, and some other States. See the note to *Laussatt v. Lippincott*, in 1 Am. Lead. Cases, 668.—R.

their own warehouse, though such re-sale was for a price less than they were directed by their principals to sell for; for the Court considered that the general authority of the broker to sell being in respect of those who did not know their private instructions, to be collected from their general dealing, was not limited by such private instructions. "Much of the argument in this case," said Lord Ellenborough, "has turned upon the question whether Sill & Co. were invested with a general authority to sell the sugars. When that question is discussed, it may be material to consider the distinction between a particular and a general authority; the latter of which does not import an unqualified authority, but that which is derived from a multitude of instances; whereas the former is confined to an individual instance. Now, in that sense of the term general authority, Sill & Co. were general agents, for they bought and sold in a multitude of instances in their own names, paid and received the money in their own names, and blended their accounts of receipts and payments without carrying each order to a separate account with the defendant; and although there was a communication between them and the defendant as to the time and place of sale, yet the world was not [*308] privy to that communication, and *had, therefore, no means of knowing that their general authority was controlled by the interposition of any check. There are, indeed, particular allusions as to the price and time of sale; in one letter the defendant writes to Sill & Co., that they may sell the whole of the St. Croix sugars (the matter in question) at sixty-eight or sixty-nine shillings on the best terms to safe men. If these expressions are to be construed into so many restrictions of the power of the brokers, it will follow that they were not only limited as to price, but

also as to the terms of sale, which, according to the letter were to be the best, and as to the purchasers who were to be safe men: and if, in either of these respects, a contract made by them should fail, their principal would have a right to reject it. But if this could be done, in what a perilous predicament would the world stand in respect of their dealings with persons who may have secret communications with their principal." In like manner, if an agent employed by the indorsee of a bill to get it discounted, warrant it to be a good bill, they are bound by his warranty. (b) On the other hand, where the defendant, being about to purchase a mare, wrote to the plaintiff, "I will take the mare at twenty guineas, of course warranted;" and subsequently wrote again, "My son will be at the World's End (a public house), on Monday, when *he will take the mare and pay you: send [*309] anybody with a receipt and the money shall be paid, only say in the receipt sound and quiet in harness." The plaintiff said she is warranted sound and quiet in double harness; and the mare, having been brought to the World's End on Monday, was taken away by the defendant's son without paying the price, and without receipt or warranty. The writings between the parties not amounting to a complete contract, it was sought to show that the defendant was bound by the contract of his son, as amounting to an acceptance in law. But it will clearly be perceived that the son was a particular agent, in which case his principal is not bound by what he does if he exceeds his authority. In this case it is clear he has only a limited authority; if a party contracts with another through his agent, he can only take such rights as the agent can give, and this is no hardship on the plain-

tiff, because he was distinctly informed that the son was authorized to receive the mare if a warrantee were given that she was quiet in harness. This was not given, and, therefore, the son had no authority to accept the mare.(c)

[One more case will sufficiently illustrate the preceding reasoning.(d) A bill of exchange was indorsed to the plaintiffs by a person who professed, in the form [*310] of indorsement, to act by *procuration of the Newcastle Banking Company. It was held, that this form of indorsement was a notice to the indorsee that the party accepting was an agent, and imposed, therefore, upon the indorsee the duty of ascertaining that he was acting within the terms of his authority; any house may allow a clerk to indorse bills of exchange in the name and on account of the firm and so give currency to them, notwithstanding any secret limitation of his authority. If this Banking Company, said Coltman, J., had been in the habit of allowing their manager to indorse bills on their behalf, that would have imported a general authority, and the public would not have been bound to inquire into the circumstances, or the precise extent of such authority. They have not, however, done so here. But in every instance, the indorsement by the form of it bears an intimation to the public that the manager acts under a special authority: and, therefore, the persons into whose hands the bill might come were bound to see that the authority was properly pursued. Bayley, J., says in *Attwood v. Munnings*,(e) "This was an action upon an acceptance importing to be by procuration; and, therefore, any person taking the

(c) *Jordan v. Norton*, 4 M. & W. 155.

(d) *Alexander v. Mackenzie*, P. O. of the Newcastle Banking Co., 6 C. B. 766, E. C. L. R. vol. 60.

(e) 7 B. & C. 283, E. C. L. R. vol. 14.

bill would know that he had not the security of the acceptor's signature, but of the party professing to act in pursuance of an authority from him. A person taking such a bill *ought to exercise due caution; for he must take it upon the credit of [*311] the party who assumes the authority to accept, and it would be only reasonable prudence to require the production of that authority." And Holroyd, J., adds, "The word *procuracion* gave due notice to the plaintiffs, and they were bound to ascertain, before they took the bill, that the acceptance was agreeable to the authority given."]

Now the reason for this (which you have probably extracted from the examples given) is very clear and simple: it is, that the public may not be deceived. If strangers see *A.* selling my goods day after day, month after month, and see me recognizing the transactions, and receiving payment on that understanding, they may naturally enough suppose that I have given him a general authority to sell, and that they may safely deal with him on my account; and it would be hard indeed if I were allowed to turn round upon them and say, "True, he has a general authority, but I had revoked it in this particular instance." But, in the case of a particular agent, it is otherwise; for, as he is employed on one particular occasion only, there are no previous acts done by him for his principal, or recognitions of them by the principal, which can have a tendency to mislead any one. And there is no hardship in saying to the person who deals with him, "You must satisfy yourself that he is my agent at all, and when you *do so you may as well satisfy yourself for [*312] what purposes he is my agent, and how far his authority extends."¹

¹ *Snow v. Perry*, 9 Pick. 542; *Fisher v. Campbell*, 9 Porter, 210;

Such then is the distinction between a particular and a general agent; and, with regard to the latter, there is, for the further protection of the public, this further rule, *that the authority of a general agent is, as far as the public are concerned, measured by the extent of his usual employment.* This is also a rule of common sense as well as law; for what I see a man continually doing with the approbation of another, I may fairly conclude he has a general authority to do. I have not, it is true, seen his instructions, but I am justified in believing that he acts according to them when I see that his principal does not signify disapprobation of his proceedings; and therefore the rule is, that, where a man permits another to act generally for him in any line of business, he is bound by contracts made by that other in that line of business; although, in truth and in fact, the person so acting may have a limited authority, or even no authority at all. This is laid down by Lord Holt, in homely, but forcible language, in Shower, 95, where it is thus reported:—

“*Memorandum.*—Upon evidence in an assumpsit for wares sold, it was held by Holt, C. J., that if a man send his servant with ready money to buy meat or other goods, and the servant buys upon credit, the master is [*313] not chargeable.¹ But if the *servant usually buy upon tick, and the servant buy some things without the master's order, yet, if the master were trusted by the trader, the master is chargeable.”

There is a case of *Rusby v. Scarlett*, (f) [where the

(f) 5 Esp. 76.

Johnson v. Wingate, 29 Maine, 404; *Hatch v. Taylor*, 10 New Hampshire, 547.—R.

¹ *Boston Iron Co. v. Hale*, 8 New Hamp. 363. Otherwise of course, if the servant or agent be ordered to buy, and be *not* furnished with money: *Sprague v. Gillett*, 9 Metcalf, 91.—R.

plaintiff was a corn chandler, who sued the defendant for the price of hay and straw sold for the use of the defendant's horses. He had delivered it at the defendant's stables, and also bills of parcels, but had never seen the defendant or received any order from him, or any payment whatever directly from him. The defendant, a gentleman, had given his coachman money to pay the bills, which he had embezzled. The defendant kept a book with his coachman, in which were entered the articles procured by him, and money from time to time advanced to him; but the money was not advanced for any particular articles, but generally. Lord Ellenborough told the jury, that, if the servant was always in cash beforehand to pay for the goods, the master is not liable, as he never authorized him to pledge his credit. But, if the servant was not so in cash, he gave him a right to take up the goods on credit; and I think he would be liable, as the servant has not paid the plaintiff, though he might have received the money from the defendant his master. Upon the law thus laid down the jury found a verdict for the plaintiff.

*"Suppose," said Lord Denman, C. J., "in [*314] another case, a landed proprietor to send his steward habitually to the neighboring fairs and markets to make sales and purchases for him in matters connected with the management of his estate. That the steward makes all these contracts in his own name, but that he is universally known to have no land of his own, and to be acting solely for his employer, by his direction and on his credit. Could his intention to make himself the owner of articles bought on one particular occasion in the course of the same dealing, deprive the vendor of his recourse against the master? clearly not." In this instance every one would naturally suppose that the proprietor who authorized him to pur-

chase in numerous cases, authorized him to purchase in that case also, in which he appropriated the thing purchased to himself, and cannot in common reason and justice be allowed to say to a person dealing innocently, that he did not authorize him in that instance. (g) In the case (h) from which these observations are taken, the defendant, who was a merchant at St. Petersburg, had for a long time carried on business in London through one Higginbotham, in all the transactions of which business Higginbotham, always used his own name, but was universally known to represent the defendant in them. He had himself neither capital nor [*315] *credit. The defendant put an end to the agency; and afterwards Higginbotham made the contract (a sale of tallow) on which the action was brought, in all respects as if it had been in the defendant's business, in his own name as usual, and notwithstanding the termination of his agency; and the defendant was quite ignorant of the transaction. These were substantially the facts in the case. The defendant was held bound to deliver the tallow. A motion for a new trial, on the ground that the sale was made by Higginbotham on his own account, was refused, on the ground that he was trading in his own name as the defendant's agent, with the defendant's full knowledge and authority; and that till the defendant gave notice to the world that he revoked Higginbotham's power to act for him, all persons had a right to hold him to the contracts made by Higginbotham. In a word, said the Court, it was considered that the defendant was carrying on his business in the name of Higginbotham.

[In accordance with the same rule, where a broker in London, engaged in the hemp trade, purchased for

(g) *Trueman v. Loder*, 11 A. & E. 593, E. C. L. R. vol. 39.

(h) *Id.* 589.

the plaintiff, a merchant at Hull, a parcel of hemp then lying at a wharf in the vendor's name, and the hemp was, by the plaintiff's desire, transferred in the wharfinger's books from the vendor's name to the broker's, and paid for by the plaintiff, the broker having contracted for the sale of hemp on his own account, and having none of *his own to deliver, transferred the defendant's hemp to the purchaser and received the money. In this case the question was, whether the broker had authority to sell. It is clear, that, as between himself and the plaintiff, his principal, he had it not; and the only question was, whether, by permitting him to act as he had done in the purchase and transfer of the hemp, he was bound by his contract with respect to it, made with a person who knew nothing of his real authority. The Court considered that the broker in this case was a general seller of hemp; that the hemp in question was left in the custody of the wharfinger in the broker's name; and that no stranger could suppose that it would be so left in the broker's name, but in order that the broker might dispose of it in his ordinary business as a broker: and they determined, that, the broker having sold the hemp, the principal was bound. (i)

[There is a series of recent instances, showing, that where a man appoints another to act for him in any line of business, he is bound by contracts made by him according to usage therein, which, although they consist of disputes between the principal and agent, and not like those we have been considering between the principal and the party with whom the agent has contracted, throw a great deal of light upon the obli-

(i) *Pickering v. Busk*, 15 East, 38.

[*317] gation of the principal derived *from the ordinary mode of transacting business, and in that point of view it will be useful to insert them here. The first of these instances is that of *Sutton v. Tatham*,^(k) where a person employed a broker to sell 250 shares in the South Australian Company; he was in an error as to the number, he meant to say 50 shares, and in reality he had no more. The broker contracted with another broker on the Stock Exchange for the sale. The shareholder on the next day informed his broker of the mistake, and, finding the bargain could not be made void, requested him to do the best he could. By the rules of the Stock Exchange, in sales of this description, if the vendor is not prepared to complete his contract, the purchaser buys the requisite number of shares, and the vendor's broker is bound to make up the loss, if any, resulting from a difference in prices; the vendor being unable to complete his contract, and the purchaser having bought the requisite number of shares at a loss, the broker paid the difference, and was held by the Court of Queen's Bench entitled to recover that difference from his principal the shareholder. "For," said Mr. Justice Littledale, "a person who employs a broker must be supposed to give him authority to act as other brokers do. It does not matter whether or not he himself is acquainted with the rules by which brokers are governed." "I [*318] consider it to *be clear law," said Mr. B. Parke, in the subsequent case of *Bayliffe v. Butterworth*,^(l) "that if there is at a particular place an established usage in the manner of dealing and making contracts, a person who is employed to deal or make a contract there, has an implied authority to act in the usual way; and if it be the usage that he

(k) 10 A. & E. 27, E. C. L. R. vol. 37.

(l) 1 Exch. 428.

should make the contract in his own name, he has authority to do so. It appears to me, that a person who authorizes another to contract for him, authorizes him to make that contract in the usual way. Thus it has been held, that one who employs a broker to buy railway shares for him, authorizes him by that employment to do all that is needful to complete the bargain; (*m*) and, therefore, where the defendant employed a broker and member of the Stock Exchange to buy some shares for him in the Vale of Neath Railway at 30*s.* discount, and at the time of the purchase a call had been made but was not payable, and the seller of the shares, in order to enable him to transfer them, paid the call, which the defendant refused to allow; and the broker, being responsible by the rules of the Exchange for the completion of the contract, paid it, he was allowed to recover the money so paid from the purchaser of the shares. The meaning of this contract clearly was, that the purchaser should become the owner of the shares upon payment of *all [**319*] such sums which the prior holders might have paid or become liable to pay in respect of them, less 30*s.* The authority, therefore, given to the plaintiff enabled him to buy the shares, and to incur a liability to pay all that had been paid upon them and that they then stood charged with, less 30*s.*"

[Of course the principal would not be bound by any rule or custom of trade made after the transaction was completed, however it might bind the agent; (*n*) and it will appear equally clear, that if he deviates from the course usual in the line of business in which he is employed, he not only has no authority in fact, but does not seem to have any, and, consequently, cannot

(*m*) Bayley v. Wilkins, 7 C. B. 886, E. C. L. R. vol. 62.

(*n*) Westropp v. Solomon, 8 C. B. 345, E. C. L. R. vol. 65.

bind his principal thereby. Thus, although the master of a ship can bind the owners by a bill of lading for goods received on board the ship, a bill of lading, although in the usual terms, given by the master in an instance where goods had never been received on board, does not bind the owners even in the hands of an assignee. All persons taking a bill of lading by indorsement or otherwise have notice that the master's authority is limited to signing bills of lading for goods received on board, and must themselves bear the consequences of the master's falsehood.(o)

[*320] [*It has no doubt been observed in the examples just given, that in some of them the extent of the agent's authority is expressly prescribed, in some partly expressed and partly not expressed, and in others altogether implied.] It is implied from the position or capacity in which a person acts. Of this description is the agency of factors, brokers, of partners, wives, and servants, all of whom have an implied or constructive authority to bind those for whom they act or are held to act, as we shall presently see more at large. The usages of trade form material points in determining the authority of an agent; and the custom of an individual as to the general mode and scope of his dealings with tradesmen, would, as we have seen, limit the implied authority of his servants to bind him by their orders. Wherever acts are done inconsistently with express directions or with the customary transactions from which agency may be implied, there is an excess of authority, and the principal is not bound.¹

(o) *Grant v. Norway*, 20 L. J. (C. P.) 98; 10 C. B. 665, S. C. E. C. L. R. vol. 70.

¹ And therefore it has been held, that where the authority purports to have been derived from a written instrument, or the agent expressly signs the contract, "by procuration," the party dealing with him is

In *Flemyng v. Hector*,^(p) it was held, on similar grounds, that where there is a managing committee of a club, who choose to deal on credit instead of for ready money payments, which they were alone authorized by the members to do, the members are not bound by such contracts.

Many cases also occur where there is no such constructive or express authority at the time of *the contract, but where it has been supplied by the subsequent assent or adoption of the principal, in which case his liability depends upon the same general reason as before. The subsequent ratification is equivalent to a prior command, and the great maxim of agency, "*Qui facit per alium facit per se*," has a retrospective effect. [Thus, Pollard, having sent a quantity of goods for sale to Fernando Po, died intestate. After his death the defendant purchased the goods from the agent of the intestate, who sold them for the benefit of the estate. At the time of sale no administration to the intestate had been granted. Subsequently the plaintiff took out letters of administration. The Court, after first laying it down that the title of an administrator relates back to the death of the intestate, decided that the plaintiff had, by suing, ratified the sale by the agent, and that it was no objection that he was unknown to the agent at the time of the sale.^(q) It is almost needless to say, that such a ratification may be inferred from the conduct of the principal, as well

^(p) 2 M. & W. 172.

^(q) *Foster v. Bates*, 12 M. & W. 226; *Lewis v. Read*, 13 M. & W. 834; *Robinson v. Gleadow*, 2 N. C. 156, E. C. L. R. vol. 29.

put upon inquiry, and is bound to examine the instrument: *Attwood v. Munnings*, 7 Bar. & Cress. 278; *Witheringham v. Herring*, 5 Bingh. 442; *Schimmelpennich v. Bayard*, 1 Peters, 264; *North River Bank v. Aymar*, 3 Hill, 262.—R.

as it may be expressed by him in words; for, as his appointment and authority may be inferred from the principal's conduct, as we have seen it may, it would be very inconsistent if his approval of what has actually been done by the agent could not also be inferred [*322] *from conduct. But, as the question is, whether the principal did or did not approve of the transaction to which it is endeavored to make him a party through the agency of another, it is held that the former cannot ratify a part of the transaction and repudiate the rest, but must adopt the whole or none.(*r*) But, where a person at the time of doing an act does not profess to be therein acting as an agent, there is nothing, strictly speaking, to ratify; and another person, however interested, cannot afterwards, by adopting the act, make the former his agent, and thereby incur any liability or take any benefit under the unauthorized act. This is a rule of considerable importance, and is fully explained in the case of *Wilson v. Tumman*.(*s*)]

But all this is subject to the observation, that the person who contracts with the agent has not *notice* of the limitation of his authority. It is very right that a stranger who sees an agent permitted to contract generally for his principal in this or that business should be safe in dealing with him, on the assumption that he has authority. But if he *knows* that he has no authority, in that case to hold the principal bound by a contract made contrary to the agent's real instructions, would be to give effect to a fraud; and accordingly, wherever the person who contracts with an

(*r*) *Wilson v. Poulter*, 2 Str. 859; *Brewer v. Sparrow*, 7 B. & C. 310, E. C. L. R. vol. 14.

(*s*) 6 M. & Gr. 236, E. C. L. R. vol. 46.

agent *knows* that *that agent's authority is limited, and nevertheless contracts with him [*323] beyond those limits, he does so at his peril, for the principal is not bound. (t) And on this account it is wise and usual for persons who have been in the habit of employing a general agent, and are desirous of discontinuing him, to give notice to the world of their intention in the Gazette, and to those persons with whom they are in the habit of dealing, by circulars. (u)

(t) See *Trueman v. Loder*, 11 A. & E. 591, E. C. L. R. vol. 39.

(u) See *Smith's Merc. Law*, 5th Ed. 135.

PRINCIPAL AND AGENT.—THEIR RESPECTIVE LIABILITIES.—
AGENCY.—OF BROKERS, FACTORS, PARTNERS, WIVES.—RE-
CAPITULATION.—REMEDIES BY ACTION.—STATUTES OF LIM-
ITATION.

PURSuing the consideration of the points arising upon contracts made through the medium of agents, and having disposed of most of those which relate to the liability of the principal upon them, the next in order is that which regards his power to take advantage of them. Now, where the agent, (a) when he makes the contract, states who his principal is, and states that he is contracting on the behalf of that principal; or where (though there may be no express statement to that effect) the circumstances of the transaction can be shown to have been so completely within the knowledge of the parties to it that there can be no doubt that it was understood at the time that the person who actually made the contract made it as an agent, and intended to make it on behalf of his principal; in such cases there can of course be no doubt of the principal's right to take advantage of it, [*325] and *enforce it to the fullest extent. It is, in truth, as if he had put his own hand to it. In such cases, therefore, there can be no difficulty. But the cases in which difficulties arise, are those in which

(a) *Seignior v. Wolmer*, Godb. 360.

the agent, being really only the substitute for another, nevertheless contracts in his own name as if he were himself the principal.

Now, in such a case, the principal may adopt and enforce the contract,^(b) but his right to do so is subject to a qualification which has been dictated by common sense and public convenience, namely, that, on declaring himself, he stands in the place of the agent who made it; so that the other contracting party enjoys the same rights against him which he would have enjoyed against the agent who made it, had that agent really been the principal. For instance, if I buy a parcel of goods from A., who sells them to me in his own name, though he is really only the factor of B., whose property the goods are, B. may, if he think proper, declare himself the principal, and require me to pay the price to him; but if the factor owed me money which I could have set off against the price had the factor sued me for it, I have the right of setting it off against B. in like manner as I might have done against the factor. And the good sense and justice of this is

(b) *Cooke v. Seeley*, 17 L. J. (Exch.) 286; 2 Exch. 746, S. C.

¹ *George v. Clagett*, 7 Term, 359; *Purchell v. Salter*, 1 Queen's Bench, 197, 41 E. C. L. R.; *Sims v. Bond*, 5 Barn. & Ald. 393, 27 E. C. L. R.; *Lime Rock Bank v. Plimpton*, 17 Pick. 159; *Leeds v. Marine Ins. Co.* 6 Wheaton, 570; *Violett v. Powell*, 10 B. Monroe, 347; *Parker v. Donaldson*, 2 Watts & Serg. 21.

As the lecturer has elsewhere expressed it, "in every case in which the agent sues in his own name, two consequences, it must be remembered, follow: 1. That the defendant may avail himself of those defences which would be good as against the agent who is the plaintiff on the record: *Gibson v. Winter*, 5 B. & Ad. 96; *Wilkinson v. Lindo*, 8 Mees. & Wels. 83; *Banerman v. Radenius*. 2. That he may avail himself of those which would be good as against the principal, for whose use the action is brought: *Welstead v. Levy*, 1 Mood. & Rob. 138; *Megginson v. Harper*, 4 Tyr. 94; *Rex v. Hardwicke*, 11 East,

obvious; for it may be exceedingly inconvenient, indeed ruinous *to me, to pay in hard cash; [*326] and my knowledge that I should have this set-off may have been my only inducement to buy; and if I were deprived of it, I should be led into a trap, induced to purchase upon one ground, and forced to pay upon a different one.

The general rule, that a principal may declare himself, and take advantage of his agent's contract made without naming him, and this qualification of it (to prevent the injustice of which it might otherwise be made the instrument), are both very clearly laid down in the judgment in *Sims v. Bond*,^(c) "It is a well-established rule of law," said the L. C. Justice, delivering the judgment of the Court in that case, "that, where a contract not under seal is made by an agent in his own name for an undisclosed principal, either the agent or the principal may sue upon it,¹ the defendant, in the latter case, being entitled to be placed in the same situation at the time of the disclosure as if the agent had been the contracting party."² [This

(c) 5 B. & Ad. 393, E. C. L. R. vol. 27.

578; *Harrison v. Vallance*, 1 Bing. 45; *Smith v. Lyon*, 3 Campb. 465." Note to *Thompson v. Davenport*, 2 Smith's Leading Cases, 317.—R.

Huntington v. Knox, 7 Cushing, 371; *Doe v. Thompson*, 2 Foster, 217.

¹ Unless, indeed, the defendant relied on the plaintiff's character as agent, and would not have contracted with him as principal if he had known him so to be: *Schmalz v. Avery*, 3 English Law and Equity Reports, 391.—R.

² If, however, the defendant either knew, or had the reasonable means of knowing that he was dealing, not with an agent, but with a principal, the latter part of the rule, as thus expressed, obviously loses its application: *Baring v. Corrie*, 2 Barn. & Ad. 137, 22 E. C. L. R.; so, if the purchaser knew that the seller was not the owner of the goods, but a factor—in such case, he can have no set-off against the latter,

rule is most frequently acted upon in sales by factors, agents, or partners, in which cases either the nominal or real contractor may sue, but it may be equally applied to other cases. Thus, in *George v. Clagett*,^(d)¹ the case was this: the plaintiff, a clothier, employed Rich and Heapy as his factors, who, besides acting as factors, bought and sold great quantities *of woollen cloths on their own account, and carried on all their business at one warehouse. Rich and Heapy became largely indebted to the defendants, who afterwards purchased woollen cloths of them, amounting to more than their debt, and on being sued by the plaintiff for the cloth so bought by them, the defendants were considered to be entitled to set off the debt of Rich and Heapy to them. By the statute of set-off,^(e) said Holroyd, J., in the very similar case of *Carr v. Hinchliff*,^(f) where there are mutual debts between a plaintiff and a defendant, the latter may set off the debt due to him against that which is claimed. The statute gives him a right to say, that the debt claimed is paid by that which is due to him, and that it operates as an extinguishment of the debt. And now, by analogy to the defence given by the statute, a defendant is also entitled to say that his debt is extinguished by another debt due to him from any person who may be identified with the plaintiff. Even where the defendants were aware that they were dealing with an agent, but that agent had a right to sell in order to pay himself advances, and the purchaser in buying the goods in question *bonâ fide* believed that

(d) 7 T. R. 359.

(e) 2 Geo. 2, c. 22.

(f) 4 B. & C. 553, E. C. L. R. vol. 10.

whether the suit be brought in the name of the principal or in his own name: *Parker v. Donaldson*, 2 Watts & Serg. 9; for in neither of these cases is the purchaser deceived.—R.

¹ And see the note to that case in 2 Smith's Leading Cases, 161.—R.

the agent sold them for that purpose, it was decided that the purchaser was entitled to set off the payments made by him to the factor. This was the case [*328] of Warner *v. M'Kay,^(g) where the Court treated the question as being, whether the defendant had a right to consider that he had paid the factor for those goods. The only doubt arose from the defendant being apprised that the goods belonged to the plaintiffs. But as the factors were accustomed to sell in their own names, and did sell these goods in their own names, and the jury having found that the defendant believed that they had authority to sell, and was not bound to inquire further, the Court supported a verdict for the defendant. Of course, if the purchaser knew all along that he was dealing with an agent, he cannot set off, in an action by the principal for the price of goods bought by him of the agent, a debt due from the agent to himself. For, that would be treating the agent and the principal as one, where they are not identified, and creating instead of preventing the injustice which the law thus seeks, by allowing a set-off of this kind, to prevent.^(h) The real grounds on which the before-mentioned cases have been decided, were stated by the Court of Exchequer in *Isberg v. Bowden*,⁽ⁱ⁾ to be, "that when a principal permits an agent to sell as apparent principal, and afterwards intervenes, the buyer is entitled to be placed in the same situation at the time of the disclosure of the real principal as if the agent had been [*329] the real contracting party, and *is entitled to the same defence, whether it be by common law or by statute, by payment or by set-off, as he was

(g) 1 M. & W. 591.

(h) *Fish v. Kempton*, 7 C. B. 687, E. C. L. R. vol. 62.

(i) 22 L. J. (Exch.) 322; 8 Exch. 852, S. C.

entitled to at that time against the agent, the apparent principal." It seems sufficiently connected with these propositions to add here, that where the principal does not intervene, but allows the agent to sue in his own name, two consequences follow: 1st, that the defendant may avail himself of all defences which would be good against the agent, who is by the supposition the plaintiff on the record.^(k) 2d, that he may avail himself of those which would be good against the principal for whose sole use the action has been brought.^(l)

Before leaving this subject, I will say one word with regard to the situation of an agent who contracts in the manner I have just mentioned, without naming his principal. It is settled, that, in such a case, the other contracting party may, when he discovers the true state of facts, elect to charge either him or his principal, whichever he may think most for his advantage. [Thus, in *Paterson v. Gandasequi*,^(m) the defendant, who was a Spanish merchant, employed Larrazabal to purchase for him various assortments of goods for the foreign market, for which he was to charge a commission *of 2 per cent. Larrazabal applied to the plaintiffs, and requested them to [*330] send to his counting-house an assortment of the goods, with terms and prices: Paterson brought patterns of the goods to the counting-house, with the terms and prices, when Gandasequi was present. The samples were handed to him. He inspected them, selected such as he required, and the terms and prices were shown to

(k) *Gibson v. Winter*, 5 B. & Ad. 96, E. C. L. R. vol. 27; *Wilkinson v. Lindo*, 7 M. & W. 81.

(l) *May v. Taylor*, 6 M. & Gr. 261, E. C. L. R. vol. 46; *Meggison v. Harper*, 2 C. & M. 322, E. C. L. R. vol. 41.

(m) 15 East, 62; *Waring v. Favenck*, 1 Camp. 84; *Kymer v. Suwercropp*, 1 Camp. 109.

him, and left there; subsequently, Larrazabal, in pursuance of directions from Gandasequi, ordered the goods from Paterson. He sold the goods on the credit of Larrazabal, made out the invoices in his name, and sent them to him, and he debited the amount to Gandasequi. The law, said Lord Ellenborough, has been settled by a variety of cases, that an unknown principal, when discovered, is liable on the contracts which his agent makes for him. On the other hand, "if the agent contract without naming any principal, he is himself the person *prima facie* responsible; and though the other party may, in most cases, elect to charge the employer on discovering him, yet he need not do so, but may, if he please, continue to look to the agent." (n) He may also] do the same where the agent, at the time of making the contract, says that he has a principal, but declines to say who that principal is. (o) (A)¹ It is

(n) *Morgan v. Corder*, Paley Prin. and Agent, 3d edit. p. 372; *Smith's Merc. Law*, by Dowdeswell, 5th edit. p. 169; *Paterson v. Gandasequi*, supra.

(o) *Thomson v. Davenport*, 9 B. & C. 78, E. C. L. R. vol. 17.

(A) The right to sue the principal when disclosed does not apply to bills of exchange accepted or indorsed by the agent in his own name alone, and not *per proc.*, for by the law of merchants, a chose in action is passed by indorsement, and each party who receives the bill is making a contract with the parties upon the face of it, and with no other party whatever. See *Beckham v. Drake*, 9 M. & W. 92, per Lord Abinger, C. B. [*Bank of Hamburg v. Wray*, 4 Strobhart, 57.]

¹ *Bacon v. Smedley*, 3 Strobhart, 542; *Perth Amboy Manufacturing Company v. Condit*, 1 Zabriskie (N. J.), 659, unless the circumstances attending the contract are such as to show an intention to look solely to the one and not to the other. If the vendor, knowing of the principal, still credits and looks to the agent as the responsible party, he of course exonerates the principal: *Page v. Stone*, 10 Metcalf, 160; *Jones v. Alton Ins. Co.* 14 Connect. 301; *Ahrens v. Cobb*, 9 Humphreys, 543; *Violet v. Powell*, 10 B. Monroe, 347; *Bate v. Burr*, 4 Harrington, 130; and this, whether the latter has or has not received the property. *Ahrens v. Cobb*. But it is obvious, that the mere fact

*important to bear in mind the rule that this election, when once made, is binding. This is the main point which is illustrated by the case of *Patterson v. Gandasequi*, already cited, when, under the facts before described, the Court laid down, that if the seller of goods, knowing, at the time of making the contract of sale, that the buyer, although dealing with him in his own name, is in reality the agent of another, elect to give credit to the agent, he cannot afterwards recover the value from the known principal. In the subsequent but almost contemporary case of *Addison v. Gandasequi*,^(p) the latter, who had acted towards the plaintiff in a similar manner to that described in noticing the case of *Patterson v. Gandasequi*, was held not to be liable, Addison having, with full knowledge of the facts, debited Larrazabal in his books. In both these cases, the vendor had elected to look to the agent for payment, knowing, at the time of the contract, that another person was the principal, and also knowing who that principal was. In the more recent case of *Thomson v. Davenport*, one M'Keene having re-

(*p*) 4 Taunt. 573.

of charging the goods to the agent, should not raise a presumption that the vendor thereby meant to rely solely on the latter, unless the name, and perhaps also the situation and circumstances, of the principal be also known to the vendor, for certainly unless he knew the *name* of the principal, there can be no opportunity of electing between him and the agent : *Lapham v. Green*, 9 Vermont, 406; *Edwards v. Golding*, 20 Id. 30; *Henderson v. Mayhew*, 2 Gill, 393; and it would seem that unless he knew, also, something of his *circumstances*, the case would be the same : *Raymond v. The Crown and Eagle Mills*, 2 Met. 319; *Upton v. Gray*, 2 Greenleaf, 374. See the note to *Thomson v. Davenport*, 2 Smith's Leading Cases (4th ed.), 317, 318.—R.

Brown v. Rundlett, 15 N. Hamp. 360; *Hovey v. Pitcher*, 13 Missouri, 191; *Hyde v. Paige*, 9 Barbour Sup. Ct. 150; *Johnson v. Smith*, 21 Connecticut, 627; *Ogden v. Raymond*, 22 Ibid. 379; *Sydnor v. Hurd*, 8 Texas, 98.

ceived an order from Davenport for the purchase of goods, ordered them from Thomson, the plaintiff, letting him know that they were for his employer, but not mentioning the name of any principal. The plaintiff named M'Keene as purchaser in the invoice of the goods : [*332] the Court considered that the plaintiff, having treated M'Keene as his debtor whilst ignorant of the real purchaser, was not bound by that election, but might afterwards sue the principal for the price. "I take it to be a general rule," said Lord Tenterden, "that, if a person sells goods, supposing at the time of the contract that he is dealing with the principal, but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal, subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if, at the time of the sale, the seller knows not only that the person who is nominally dealing with him is not the principal but agent, and also knows who the principal really is, and, notwithstanding all that knowledge, deals with him and him alone, then the seller cannot afterwards, on the failure of the agent, turn round and charge the principal, having once made his election at the time when he had the power of choosing between the one and the other. The present is a middle case; at the time of the dealing for the goods, the plaintiffs were informed that M'Keene, who came to buy the goods, was dealing for another, that is, that he was an agent; but [*333] they were not informed who the principal was. They had not, therefore, at that time, the means

of making their election. It is true, that they might perhaps have obtained those means, if they had made further inquiry; but they made no further inquiry. Not knowing who the principal really was, they had not the power at that instant of making their election; that being so, it seems to me that this middle case falls, in substance and effect, within the first proposition that I have mentioned, the case of a person not known to be an agent, and not within the second, where the buyer is not merely known to be an agent, but the name of his principal is also known. There may be another case, and that is, where a British merchant is buying for a foreigner. According to the universal understanding of merchants and of all persons in trade, the credit is then considered to be given to the British buyer, and not to the foreigner.”(q) Although, of course, a contract may be made by the agent so as to charge the foreigner and not himself.(r) Indeed, it hardly requires mentioning, that the question, which is liable—the foreign principal or the English agent is one of intention, in which the fact, that the principal debtor is a foreigner residing abroad, renders it highly improbable that the credit should have been given to him.]

*But there is this qualification to the right of election, namely, that if the state of accounts [*334] between the agent and principal have been altered, so that the principal would be subjected to a loss by the other contracting party's election, the right of election is in such case lost. Suppose, for instance, I employ *A.* to purchase goods, and he purchases them from *B.* in his

(q) See *Wilson v. Zulueta*, 19 L. J. (Q. B.) 49; 14 Q. B. 405, S. C. E. C. L. R. vol. 68.

(r) *Mahony v. Kekulé*, 23 L. J. (C. P.) 54; 14 C. B. 390, S. C. E. C. L. R. vol. 78.

own name. Now *B.*, when he discovers me to be the real principal, may elect whether he will treat me or my agent *A.* as his debtor. But if, in the mean time, I have paid *A.*, he will lose that right, since otherwise I should have to pay the price twice over. Still, this qualification is itself subject to a minor one, namely, that the principal cannot, by prematurely and improperly settling with his agent, deprive the other contracting party of his right of election. Suppose, for instance, as in the case I have just put, that I employ *A.* to purchase goods, not for ready money, but at three months' credit. *A.* purchases in his own name from *B.* *B.*, before the three months have elapsed, discovers the true state of affairs, and elects to take me as his debtor. I should be allowed to say, in this case, "You are too late; I have settled with *A.* my agent." The answer would be, "You had no occasion to do so pending the time of credit; and you cannot by doing so deprive *B.* of his right to elect you as his debtor." (s) (A)

(s) *Thomson v. Davenport*, *supra*; and *Kymer v. Suwercropp*, 1 Camp. 109, n. (a); *Heald v. Kenworthy*, 24 L. J. (Exch.) 76.

(A) The cases in which an agent is personally liable, and may be sued on the contract he makes, may be thus classed:—

In the first place, he is liable, according to the doctrine in *Thomson v. Davenport*, where the principal was not disclosed at the time of the contract; but if he were known, and credit were given to *him* at the time, the agent cannot be afterwards sued, provided he acted within the scope of his authority. [*Patton v. Brittain*, 10 Iredell, 8.]

In the second place, the agent is liable, as we have already stated, where he exceeds his authority, or represents himself to have an authority which he has not, the want of authority being unknown to the other party: *Jones v. Downman*, 4 Q. B. 235, 45 E. C. L. R.; [*Dusenbury v. Ellis*, 3 Johns. Cas. 70; *Meech v. Smith*, 7 Wendell, 315; *Woodes v. Dermott*, 9 New Hampshire, 55;] for in such cases the creditor has no remedy against the principal: *Wilson v. Barthrop*, 2

*[In the last-mentioned case, Lord Ellenborough said, "A person selling goods is not [*335]

M. & W. 863.¹ Here again, however, arises a question, as we have seen, how far *Smout v. Ilbery* (supra) is good law, and that the agent is to be held liable where it cannot be proved that he fraudulently misrepresented his authority. But that case clearly decides another very important point, namely, that where a man has been in the habit of dealing with the plaintiff for household goods, the wife is not liable for such as are supplied to her after his death, but before information of his death had been received, she having had originally full authority to contract, and done no wrong in representing her authority as continuing, nor omitted to state any fact within her knowledge, relating to it; the revocation itself being by the act of God, and the continuance of the life of the principal being equally within the knowledge of both parties.

In the third place, an agent is liable for himself and his heirs under seal, for the act of the principal, though he describe himself in the deed as covenanting for and on behalf of such other person: *Hancock v. Hodgson*, 4 Bing. 269, 13 E. C. L. R.; *Appleton v. Binks*, 5 East, 148.²

An agent is liable, in the fourth place, where he contracts in writing in his own name,³ unless it appear on the face of the contract that he

¹ *Hampton v. Speckenagle*, 9 Serg. & Rawle, 212, unless, of course, the principal should have subsequently ratified the agent's act: *Bragg v. Fessenden*, 11 Illinois, 544; *Fitzsimmons v. Joslin*, 21 Vermont, 199; but such ratification by the principal must be shown to have been made with a full knowledge of the facts, and an understanding that he would not be liable unless he did so ratify: *Fletcher v. Dysant*, 9 B. Monroe, 413.—R.

² *Burrell v. Jones*, 3 Barn. & Ald. 47; *Sumner v. Williams*, 8 Mass. 162; *Belden v. Seymour*, 8 Connect. 24; *White v. Dewey*, 15 Pick. 433; *Donohue v. Emory*, 9 Metcalf, 66; *Mason v. Caldwell*, 5 Gilman, 196. It has, however, been held, in a few cases, that where a person expressly covenants in his representative capacity, "and not otherwise," he will not be personally liable, as no false confidence of security is excited on the part of the purchaser: *Thayer v. Wendell*, 1 Gallison, 16, per Story, J.; *Day v. Browne*, 2 Hammond, 347; *Manifer v. Morrison*, 1 Dana, 208, 6 Alabama, 77.—R.

³ *Burrell v. Jones*, 3 Barn. & Cress. 160; *Hopkins v. Mehaffey*, 11 Serg. & Rawle, 129; *Kirkpatrick v. Stainer*, 22 Wend. 244; *Taintor v. Prendergrast*, 3 Hill, 72; *Simonds v. Heard*, 22 Pick. 121.—R.

confined to the credit of a broker who buys them, but may resort to the principal on whose account they are bought; and he is no more affected by the state of accounts between the two, than I should be were I to deliver goods to a man's servant pursuant to his order, by the consideration of whether the servant was indebted to the master, or the master to the servant. If he lets the day of payment go by, he may lead the principal into a supposition that he relies solely on the broker; and if, in that case, the price of the goods has been paid to the broker on account of this deception, the principal shall be discharged. But, in this case, payment was demanded of the defendant on the several days it became due, and no reason was given him to believe that the broker alone was trusted. The

did so only as an agent;¹ otherwise he will not be allowed to give parol proof that he contracted as agent, so as to relieve himself from responsibility. But parol evidence may nevertheless be given to charge an unknown principal, as it does not deny that the contract is binding on those whom, on the face of it, it purports to bind, but shows that it also binds another by reason that the act of the agent in signing the agreement in pursuance of his authority is, in law, the act of the principal: *Higgins v. Senior*, 8 M. & W. 844, per Parke, B. See also *Jones v. Littledale*, 1 N. & P. 697, 36 E. C. L. R.; *Magee v. Atkinson*, 2 M. & W. 440.

¹ In *Higgins v. Senior*, the point actually decided was, that a defendant could not shift a liability from his own shoulders to that of another, by showing that a contract which purported to be signed on his own account, was, in reality, signed as agent for another; and the same has been held in this country, even in cases where the party signed as agent, but not naming the principal: *Pentz v. Stanton*, 10 Wend. 277; *Stackpole v. Arnold*, 11 Mass. 27; *Alfridson v. Ledd*, 12 Id. 175; *Bradlee v. Glass Co.* 16 Pick. 347. But in *Higgins v. Senior*, it was further suggested, as had also been done in *Jones v. Littledale*, that a distinction existed between evidence to discharge a defendant, and evidence to charge an additional party; as, in the latter case, the evidence would not contradict the written instrument, but only show that it bound another party.—R.

defendant had received a great part of the goods, the right of the vendors was entire, unless the defendant had paid the price to them, or to some person authorized by them to receive it. The broker had no such authority, therefore the defendant is liable." In that case, as observed by the Court of Common Pleas in the subsequent case of *Smyth v. Anderson*,^(t) Lord Ellenborough must be considered as having properly decided that the defendant had no right to set up a payment accepted by the brokers contrary to their duty, and not *made by him in conformity [*336] with the obligation which the contract imposed upon him.

[In the case of *Smyth v. Anderson*,^(u) just mentioned, Melville ordered of the plaintiffs certain goods, telling him they were for shipment to Bombay, pursuant to order received. They were in fact ordered for Anderson, and were received by him; but Melville could not say whether, at the time of giving the order, the name of Anderson was mentioned. The invoices, however, sent afterwards, described the goods as "bought on account of Anderson, Bombay, per Melville, London, by Pender & Co., agents" (the plaintiffs). In payment for these goods, the plaintiffs drew bills upon Melville, which bills were dishonored. Melville had a general account with Anderson, on which, at the time of his stopping payment, he was debtor to Anderson in a large amount. There was no evidence of any payment by him to Melville applicable to these goods in particular; but, shortly after the shipment of them, Melville sent Anderson an account debiting him with the amount of the bills, and the latter had since, but before they became due, remitted to Melville an

(t) 7 C. B. 39, E. C. L. R. vol. 62.

(u) 18 L. J. (C. P.) 109; 7 C. B. 21, S. C. E. C. L. R. vol. 62.

amount more than sufficient to cover them. "Melville," said Maule, J., "having become insolvent, Anderson is sued for the price, and the question is, whether it is fair and reasonable he should be so charged. The [*337] *plaintiffs got what they considered an advantage, the security of Melville, and must be taken to have requested that all might be done that was necessary and incident to that arrangement; and, therefore, the remittance made by Anderson to provide for the bills, which was the natural and proper course to be taken by him, was substantially made with the cognizance and at the request of the plaintiffs; can they then be permitted to call upon the defendant to pay the price of the goods over again? The fact that the money was paid before the bills became due, does not prevent the defendant from availing himself of this defence. When all the parties are living in this country and the agent has not accepted bills on account of the goods, so that the duty of putting him in funds by a previous remittance does not arise, if the principal pays the broker before the proper time has arrived, and without the privity of the seller, one can perceive the justice of not permitting the principal to set up such premature payment in answer to the seller's claim on him for the price."

[The law of agency has derived much illustration from many recent cases which have been decided upon partnership contracts, for "all questions between parties," as expressed by Parke, B., in the case of *Beckham v. Drake*,(x) "are no more than illustrations of [*338] the same questions as between *principal and agent." It is thought, therefore, that some leading principles of the law of contracts, as it respects this species of agency, may be useful here, as further

illustrating what has been said before, and also as giving some insight into that important head of law to which it directly pertains.

Partnership is the result of a contract whereby two or more persons agree to combine property or labor for the purpose of a common undertaking, and the acquisition of a common profit.^(y) One partner may contribute all the money, or all the stock, or all the labor necessary for the purposes of the firm. But, in order to make people liable as partners to each other, it is necessary that there should be a community of profits,^(z) although one of them may stipulate to be indemnified against loss.^(a) This, however, respects their mutual claims, for, however they may stipulate with each other, all who take a share in the profits,^(b) and all who allow themselves to be described and held out as partners, are liable as such to those to whom they have so held themselves out :^(c)—supposing the parties to have become partners, the result is that each individual partner constitutes *the others his [*339] agents for the purposes of entering into all contracts for him within the scope of the partnership concern, and, consequently, that he is liable to the performance of all such contracts in the same manner as if entered into personally by himself.^(d) It follows at once, that in general no new member can be introduced into the partnership without the consent of all the part-

(y) Smith's Merc. Law, 5th edit. by Dowdeswell, p. 19.

(z) Hoare v. Dawes, 1 Doug. 371.

(a) Bond v. Pittard, 3 M. & W. 357.

(b) Heyhoe v. Burge, 9 C. B. 431, E. C. L. R. vol. 67; 19 L. J. (C. P.) 243.

(c) Dickenson v. Valpy, 10 B. & C. 140, E. C. L. R. vol. 21; Fox v. Clifton, 6 Bing. 793, E. C. L. R. vol. 19.

(d) 6 Bing. 792, E. C. L. R. vol. 19.

ners ;(e) for to do so would be for an agent to appoint an agent in the matter of the agency, which, as we have seen, cannot in general be done. It follows, also, from the same principle, that where there is no specific authority, the individual members will be liable upon the partnership contracts, or not, according as the contract is in the ordinary course of the partnership business or not.¹ Thus, in *Adams v. Bankart*, (f) it was held, that

(e) *M'Neill v. Reid*, 9 Bing. 68, E. C. L. R. vol. 23.

(f) 1 C. M. & R. 681.

¹ Thus a partner cannot bind the firm by a submission to arbitration or by a confession of judgment: *Adams v. Bankarts*, *supra* ; *Karthauss v. Ferrer*, 1 Peters, 222 ; *Barlow v. Reno*, 1 Blackford, 252 ; *Grazebrook v. M'Creddie*, 9 Wendell, 437 ; *Harper v. Fox*, 7 Watts & Serg. 142 ; "because it would bind the persons and separate estates of the members, and thus transcend the limits of partnership authority ;" nor can one partner give a separate creditor an order on a debtor of the firm : *M'Kinney v. Bright*, 4 Harris, 399 ; or otherwise apply partnership effects to the payment of his own debts : *Yale v. Yale*, 13 Connect. 185 ; *Rogers v. Batchelor*, 12 Peters, 230 ; *Livingston v. Hastie*, 2 Caines, 249 ; *Moddewell v. Kever*, 8 W. & S. 63 ; *Dob v. Halsey*, 16 Johns 34 ; *Langan v. Hewett*, 13 Sm. & Marsh. 122.

As a general rule, nothing is better settled, than that the general power of a partner does not extend so far as to enable him to bind the firm by a specialty : *Van Deusen v. Blum*, 18 Pick. 229 ; *Clement v. Brush*, 3 Johns. Cas. 180 ; *Cummings v. Cassily*, 5 B. Monroe, 74 ; *Posey v. Bullitt*, 1 Blackford, 99 ; though if the instrument were executed in the presence of and by the direction of his copartner, it would be the deed of both : *Ball v. Dunsterville*, 4 Term, 313 ; *Overton v. Tozer*, 7 Watts, 159 ; *Ludlow v. Simond*, 2 Caines's Cases, 1, 42, 55 ; *Mackay v. Bloodgood*, 9 Johnson, 285 ; *Henderson v. Barbec*, 6 Blackford, 26, 28. But in *Gram v. Seton*, 1 Hall, 262, and *Cady v. Sheppard*, 11 Pick. 400, it was determined, after much consideration of all the authorities, that a partner may bind his copartner by a contract under seal, in the name and for the use of the firm, in the course of the partnership business, provided the other partner assents to the contract previously to its execution, or afterwards ratifies and adopts it, and this assent or adoption may be by parol, and such a conclusion is perhaps now sustained by the weight of authority : *Pike v. Bacon*, 21 Maine, 270 ; *Swan v. Steadman*, 4 Metcalf, 548 ; *Bond v.*

one partner has no implied authority to bind his co-partner to a submission to arbitration respecting the matters of the partnership; for, it is clear that such a power does not arise out of the relation of partnership, and is not, therefore, to be inferred from it; and, where it is relied upon, it must, like every other authority, be proved either by express evidence, or by such circumstances as lead to the presumption of such an authority having been conferred. Thus, also, in *Hasleham v. Young*, (g) where persons were *in part-^[*340]nership as attorneys, and one of them gave an undertaking, that, in consideration that the plaintiff in an action would discharge the defendant in that action, who was in custody under an execution therein, they, the attorneys, would pay the plaintiffs the debt and costs on a certain day, and he signed it with the partnership name; but the Court considered it a very clear case that the guarantee was not given in the

(g) 5 Q. B. 833, E. C. L. R. vol. 48; *Brettel v. Williams*, 4 Exch. 623.

Aitkin, 6 Watts & Serg. 165; *Lucas v. Sanders*, 1 M'Mullan, 311; *Fleming v. Dunbar*, 2 Hill (S. C.) 532; *M'Cart v. Lewis*, 2 B. Monroe, 267; *Davis v. Burton*, 3 Scammon, 41; *Hatch v. Crawford*, 2 Porter, 54.

It has moreover been determined, that if the act of one partner be a good and valid act in itself, it will not be rendered the less so if done by a specialty, provided the seal do not vary the liability: *Deckard v. Case*, 5 Watts, 22; *Henessy v. Western Bank*, 6 Watts & Serg. 301; *Tapley v. Butterfield*, 1 Metcalf, 515; which cases, and many others upon the subject of the power of a partner to bind the firm, the student will find classified in the note to *Livingston v. Rosevelt*, 1 Am. Lead. Cases, 460.—R.

See farther, on the extent of the power of one partner to bind the firm, *Rollins v. Stevens*, 31 Maine, 454; *Doremus v. M'Cormick*, 7 Gill, 49; *Price v. Alexander*, 2 Greene, 427; *Lang v. Waring*, 17 Alabama, 145; *Buchoz v. Grandjean*, 1 Manning, 367; *Mills v. Dickson*, 6 Richardson, 487; *Drake v. Brander*, 8 Texas, 351.

usual course of business, and, no authority being shown, that the firm was not liable.] There is nothing, however, to prevent the parties from confining the credit to an individual partner; and it is a question for the jury whether this has or has not been done. Where there has been nothing to discharge a partner from his liability, or to rebut the presumption of authority to pledge his credit arising from the mere fact of his being a partner, he is clearly liable: but where there are facts to show that it was the intent of the contracting parties to restrict the credit to one of several partners, the liability is limited by such intent. Cases of this description occur where the partner represents himself as the only person composing the firm. Thus, in *De Mautort v. Saunders*,^(h) Saunders (not the defendant) and Wiehe drew a bill at the Mauritius on Saunders Brothers (the defendants) in London, payable to Bougier, who indorsed it to the plaintiff, and the [*341] *defendants accepted the bill. On being sued upon it they set up as a defence that they were in partnership with Wiehe & Saunders. The Court held, that the verdict, which was for the plaintiff, was proper, and observed, that it was for the jury to say whether the plaintiff, when he took the bill, had any reason to know that Wiehe & Saunders were partners in the house in London on which the bill was drawn. It was incumbent on the defendants to show that the plaintiff had trusted the other two persons; for, if a person contract with two others, he may sue them only. If, indeed, after the contract be made, he discover that they had a secret partner who had an interest in the contract, he is at liberty to sue that secret partner jointly with them, but he is not bound so to do. On the other hand, where an action was brought for the price of

(h) 1 B. & Ad. 398, E. C. L. R. vol. 20.

coals delivered to the defendant and W. Smith under the name of Bush & Co., and for some time before the coals were ordered the partnership consisted of Bush and W. Smith; and, on Bush's death, before the order was given, W. Smith became a partner with defendant, but they carried on their trade under the old name of Bush & Co: it was therefore contended, that W. Smith should have been sued conjointly with the defendant. The Court decided, that, the partnership having been fully proved, the defendant would not be liable unless he led the plaintiff to believe that he alone constituted the firm of Bush & *Co.⁽ⁱ⁾ If a person contracting with another for goods, said Lord Abin- [*342] ger, C. B., delivers an invoice made out to a firm, and nothing is said as to the persons composing it, he takes his chance who are the partners in that firm. If, indeed, the party represents himself as the only person composing the firm, an action may be brought against him alone; or if, on being asked who his partners are he refused to give any information, that might be evidence for the jury to say whether he did not hold himself out as solely liable.

[There is another case so well worth attending to, that it will not be multiplying examples too much to adduce it here. Nesham agreed to sell all the stock, machinery, &c., of a printing office to Lowthin for 1500*l.*, to be paid with interest, by yearly instalments in seven years, and guaranteed to him the clear yearly profit of 150*l.*, over and above the payment of principal and interest before-mentioned; and Lowthin agreed to pay all the surplus profits to Nesham, until they should amount to 500*l.*, if they should amount to so much during the seven years, in which event he should also pay over and above the purchase-money,

(i) Bonfield v. Smith, 12 M. & W. 405.

interest and 500*l.*, the existing liabilities which were fixed between them at 250*l.* Lowthin carried on the newspaper in his own name, and purchased, in his own name, from the plaintiff, paper for the use of the concern, *and used it therein, but the plaintiff [*343] never actually gave any credit to Nesham. Yet, the Court held Nesham liable as sharing the profits,^(k) and indeed it seems difficult to treat the case otherwise than as that of an unknown principal sued upon being discovered to be such. Another case is where one partner has authority from the others to make the contract in question on his own account only, and not on theirs. Thus, where the plaintiff supplied paper to one Whitehead, a printer, and it was proved that there was an agreement between Whitehead, Ackermann, and Carleton, to bring out a periodical publication called the *Sporting Review*, in which Ackermann was to be publisher, Carleton editor, and Whitehead printer, and the latter was to supply the paper, and charge it to the account of the three, who after payment of all expenses were to share the profits equally. No profits were made. The plaintiffs sued the three and were nonsuited, and the Court considered that the question was, did Ackermann and Carleton authorize Whitehead to purchase the paper on their account or his own. He might, they said, have applied the paper to any other purpose than the *Sporting Review*.^(l) The result is, that the liability arising from the naked fact of partnership is *prima facie*, and may be rebutted by direct evidence [*344] that credit was not given to the *partnership, but to an individual member of it.^(m) This

(k) *Barry v. Nesham*, 3 C. B. 641, E. C. L. R. vol. 54.

(l) *Wilson v. Whitehead*, 10 M. & W. 503.

(m) *Peacock v. Peacock*, 2 Camp. 45; *Beckham v. Knight*, 4 N.

doctrine is very strongly corroborated by one of the latest cases on the point, *Holcroft v. Hoggins*.⁽ⁿ⁾ The plaintiff had been engaged to write articles in the *Newcastle Advertiser*, by a person, who at the time of the contract, had become, in fact, the sole proprietor of the newspaper, and the two defendants were sought to be made liable, in consequence of their having suffered their names to remain as registered proprietors of the newspaper, in the declaration required to be filed by 6 & 7 Will. 4, c. 76, they having previously been proprietors of the newspaper, but having ceased to be so before the contract was entered into. It was adjudged that not only were the defendants not liable, but that the fact of their being co-proprietors was immaterial, though they had held themselves out as such, if it were shown that another partner contracted with the plaintiff in such a manner that credit was given to him and not to them. And the Court thought that the evidence was, that the contract was made by the sole proprietor, upon his own sole responsibility, and not upon that of the defendants. It was true, that, on the register at the stamp office, they held themselves out as proprietors, and if it had been shown that the *plaintiff was thereby induced [*345] to enter into the contract, they might have been liable.]

It must also be shown that the debt for which an action is brought accrued during the time the party sued was actually in partnership. He will be liable neither for contracts made before^(o) nor after^(p) he C. 243, E. C. L. R. vol. 33; 1 M. & Gr. 738, E. C. L. R. vol. 39, Exch. Ch.

⁽ⁿ⁾ 2 C. B. 488, E. C. L. R. vol. 52; 15 L. J. (C. P.) 129, S. C.

^(o) *Vere v. Ashby*, 10 B. & C. 288, E. C. L. R. vol. 21; *Battley v. Lewis*, 1 M. & Gr. 155, E. C. L. R. vol. 39; *Beale v. Moulds*, 10 Q. B. 976, E. C. L. R. vol. 59; *Whitehead v. Barron*, 2 M. & Rob. 248.

^(p) *Heath v. Sanson*, 4 B. & Ad. 172, E. C. L. R. vol. 24.

became a partner, provided he gives proper notice of his retirement.(q)

It has been long held that dormant partners are equally liable with ostensible partners upon all contracts made for the firm during their partnership; on the principle [not perhaps very satisfactory], that the dormant partner, being entitled to all the profits of the contract made by the firm to which he belongs, ought also to share in the liability; he having a right moreover to sue others on it,(r) he ought not to be protected from being sued on it by them: for "*Qui sentit commodum sentire debet et onus.*" It is therefore decided, that, as an undisclosed principal may be made liable as soon as he is discovered, subject to all the equities between the parties, so may an undisclosed partner. Neither is there any distinction between express or written contracts, and those which are implied or verbal. [*346] *This was decided in the case of *Beckham v. Drake.*(s)

Nominal partners are as liable as dormant ones, not because they are principals for whom others are agents, but on the ground that credit may have been given to them, and it is just to the creditor that they should be responsible for the result of so holding themselves out to the world. [Indeed, it would be highly prejudicial to commerce to allow a wealthy man, by the loan of his name, to give other persons a factitious credit in the world, and then to refuse to satisfy creditors who had made their advances upon the faith of his apparent responsibility.(t)]

(q) *Parkin v. Carruthers*, 3 Esp. 248; *Williams v. Keats*, 2 Stark. 290, E. C. L. R. vol. 3; *Dolman v. Orchard*, 2 Car. & P. 104, E. C. L. R. vol. 12; *Moorsom v. Bell*, 2 Camp. 616.

(r) *Robson v. Drummond*, 2 B. & Ad. 308, E. C. L. R. vol. 22.

(s) 9 M. & W. 79.

(t) *Waugh v. Carver*, 2 H. Bl. 242.

A general notice is sufficient to discharge partners who retire from firms as regards the world at large ; but an express notice is requisite to discharge them as regards previous customers. This being done, the retiring partner is effectually discharged from all debts subsequently accruing ; nor can he be made liable by any unauthorized use of his name by his previous partners,^(u) though his liability, as well as his power to make admissions, or to release or sue for debts contracted during his partnership, of course remains.

In *Farrar v. Definne*,^(x) the defendant had been a dormant partner, but ceased to be so before the *debts accrued for which the action was [*347] brought. The plaintiff had known of the partnership, but the dissolution not having been advertised, he had no knowledge of it. Mr. Justice Cresswell said, in summing up the case, "The law stands thus : if there had been a notorious partnership, but no notice had been given of the dissolution thereof, the defendant would have been liable. If there had been a general notice, that would have been sufficient *for all but actual customers* ; these, however, must have had some kind of actual notice. If the partnership had remained profoundly secret, the defendant could not have been affected by transactions which took place after he had retired ; but if the partnership had become known to any person or persons, he would be in the same situation *as to all such persons*, as if the existence of the partnership had been notorious."

Where bills are drawn by partners in trade, the general authority implied by the custom of merchants binds each partner ; but not so where the partnership is not of a commercial nature, such as that of attorneys

(u) *Abel v. Sutton*, 3 Esp. 108.

(x) 1 C. & K. 580, E. C. L. R. vol. 47.

for instance, in which case it must be shown that the party accepting or drawing had special authority to do so, even where it is done in the name of the firm.(y) Where one partner signs for the firm [being authorized to do so, and describes himself as signing for the [*348] firm, he *is not separately liable, but the firm alone.(z) If he accepts, professing to have authority which he has not, a bill addressed to the firm, he makes himself liable thereby.(a)

[It will be concluded from the nature of partnership authority, that] partners are not liable for the fraudulent contracts of a copartner, if they can prove the knowledge of the fraud by the plaintiff.(b) Neither are they bound where an express warning was given to the plaintiff by the partners sought to be charged.

[There are two other classes of agents so commonly employed, and that upon business so important, that a few propositions of law respecting them will be useful; these are brokers and factors. Factors are intrusted with the possession of the property they are to dispose of; brokers are intrusted with the disposal but not with the possession. The latter, by force of the stat. 6 Ann. c. 16, cannot practise in London without being admitted by the Mayor and Aldermen, when they take an oath and enter into a bond for the observance of certain regulations.(c) We have seen

(y) *Hedley v. Bainbridge*, 3 Q. B. 316, E. C. L. R. vol. 43; *Levy v. Pyne*, 1 Car. & M. 453, E. C. L. R. vol. 41.

(z) *Ex parte Buckley*, In re *Clarke*, 14 M. & W. 469, overruling *Hall v. Smith*, 1 B. & C. 407, E. C. L. R. vol. 8.

(a) *Owen v. Van Uster*, 10 C. B. 318, E. C. L. R. vol. 70; 20 L. J. (C. P.) 61, S. C.; *Nicholls v. Diamond*, 23 L. J. (Exch.) 1; 9 Exch. 154, S. C.

(b) *Musgrave v. Drake*, 5 Q. B. 185, E. C. L. R. vol. 48.

(c) *Kemble v. Atkins*, Holt N. P. 427, E. C. L. R. vol. 3; 6 Anne, c. 16; 57 Geo. 3, c. 1x; 10 Anne, c. 19, s. 121.

*that a person acting as broker in London, [*349] without being duly qualified, cannot recover compensation.(*d*) Brokerage relates to goods and money, and not to contracts for labor,(*e*) therefore, a stockbroker is within the statute,(*f*) but not a ship-broker,(*g*) or an auctioneer,(*h*) or one who procures and hires persons to work for another, in surveying lines of railway.(*i*) Each stockbroker is bound to keep a book called a broker's book, and to enter in it all contracts for stock, with dates and names, and to produce it when required.(*k*) All other brokers keep a book and make similar entries in it, which in London they are required to do by their bond,(*l*) and this entry signed by the broker who has negotiated the sale and purchase of goods, constitutes the binding contract between the parties,(*m*) whose agent for making it the broker is.(*n*) But in practice, the bought and sold notes, which are memoranda of the purchase and sale, signed by the broker, and sent to the parties, are considered as constituting the complete proof of the contract. A remarkable variation from the *usual course of business, obtains in the case of insurance brokers.(*o*) By these per- [*350] sons subscriptions to a policy of assurance are almost always procured, to them the underwriters look for the premium of insurance, and the assured pay the

(*d*) Cope v. Rowlands, 2 M. & W. 149.

(*e*) Milford v. Hughes, 16 M. & W. 174.

(*f*) Clarke v. Powell, 4 B. & Ad. 846, E. C. L. R. vol. 24.

(*g*) Gibbons v. Rule, 4 Bing. 301, E. C. L. R. vol. 13.

(*h*) Wilkes v. Ellis, 2 H. Bl. 555. (*i*) Milford v. Hughes, supra.

(*k*) 7 Geo. 2, c. 8. (*l*) Kemble v. Atkins, supra.

(*m*) Sivewright v. Archibald, 20 L. J. (Q. B.) 529; 17 Q. B. 104, S. C.; E. C. L. R. vol. 79.

(*n*) Hinde v. Whitehouse, 7 East, 558.

(*o*) Goom v. Aflalo, 6 B. & C. 177, E. C. L. R. vol. 13.

premiums to the broker. This is clearly explained in the following extract from the judgment of Bayley, J., in *Power v. Butcher*:(*p*)—Now, according to the ordinary course of trade between the assured, the broker, and the underwriter, the assured do not in the first instance pay the premium to the broker, nor does the latter pay it to the underwriter. But, as between the assured and the underwriter, the premiums are considered as paid. The underwriter, to whom in most instances the assured are unknown, looks to the broker for payment, and he to the assured. The latter pay the premiums to the broker only, and he is a middle man between the assured and the underwriter; but he is not solely agent, he is a principal to receive the money from the assured and to pay it to the underwriter.

[As to the mode in which, in the event of a loss, the payment is made to the assured, the brokers usually settle and adjust the loss, and receive the payment. It is a frequent custom to make settlements in account, there being, as you have seen, an account between the [*351] broker and the underwriter; *and it is clear that if the assured have, or ought, in the common course of things, to have known of such a custom, they will be bound by it, where money has not been actually paid by the underwriter. This was decided in *Stewart v. Aberdeen*;(q) but the Court added, in delivering its judgment, “It must not be considered, that, by this decision, the Court means to overrule any case deciding that where a principal employs an agent to receive money and pay it over to him, the agent does not, thereby, acquire any authority to pay a demand of his own upon the debtor, by a set-off in account with him. But the Court is of opinion, that, where an insurance

broker or other mercantile agent has been employed to receive money for another, in the general course of his business, and where the known general course of business is for the agent to keep a running account with the principal, and to credit him with sums which he may have received, by credits in account with the debtors with whom he also keeps running accounts, and not merely with moneys actually received, the rule laid down in those cases cannot properly be applied; but it must be understood that where an account is *bonâ fide* settled according to that known usage, the original debtor is discharged, and the agent becomes the debtor, according to the meaning and intention and with the authority of the principal."

*[These few propositions, it is hoped, will [*352] enable you more readily to understand those cases of the law of principal and agent, where the latter is a broker, and where the general rules do not, therefore, seem directly applicable without reference to these peculiarities.

[As factors are intrusted with the possession of goods usually for the purpose of selling them, the ordinary rules applying to agents apply to them, so far as they are exercising their authority to sell. Thus, the Court of Common Pleas decided in the case of *Smart v. Sandars*,^(r) that the mere relation of principal and factor confers ordinarily an authority to sell at such times and for such prices as the factor may, in the exercise of his discretion, think best for his employer; but if he receives the goods, subject to any special instructions, he is bound to obey them. But this being the factor's usual employment, it is obvious that if he pledges the goods which he is authorized to

(r) 3 C. B. 380, E. C. L. R. vol. 54; 5 C. B. 895, E. C. L. R. vol. 57. See *Harrison v. Scott*, 5 M. P. C. Cases, 357.

sell, he does not act in the usual course of his employment; and if he has not an express authority to pledge, he cannot, by pledging, confer any right on the pledger.^(s) It was thought expedient to alter this rule of law, and three statutes have been passed upon the subject of contracts made by factors, by "which and [*353] by the common law already described, *those contracts are now regulated." These (and the rules ^{they} apply to all instances of statute law) must be studied in their very words, although a general sketch of their effect is attempted here. The first of these statutes is 4 Geo. 4, c. 83; this was altered and amended by 6 Geo. 4, c. 94, and both have received amendment by the 5 & 6 Vict. c. 39. The following very succinct description of the effect of these statutes is extracted from a work of the greatest utility and accuracy, Chitty's Collection of Statutes, with notes, by Welsby and Beavan, 2d Vol. p. 47: "First, where goods, or documents for the delivery of goods, are pledged as a security for present or future advances, with the knowledge that they are not the property of the factor, but without notice that he is acting without authority; in such a case the pledgee acquires an absolute lien. Secondly, where goods are pledged by a factor without notice to the pledgee that they are the property of another, as a security for a pre-existing debt, in that case the pledgee acquires the same right as the factor had. Thirdly, where a contract to pledge is made in consideration of the delivery of other goods or documents of title, upon which the person delivering them up had a lien for a previous advance (which is deemed to be a contract for a present advance), in that case, the pledgee acquires an absolute lien to the extent of the value of the goods given up." It will not

(s) *Martini v. Coles*, 1 M. & Sel. 140; *Shipley v. Kymer*, Id. 484.

fail to be observed, that the persons whose dealings with property or *documents in their possession are within the protection of these statutes, [*354] are persons intrusted therewith as factors or agents, (t) not persons to whose employment a power of sale is not commonly incident as wharfingers, (u) and that the transactions which are within the statute are mercantile transactions. (x) The statute, therefore, does not apply to advances made upon the security of furniture used in a furnished house to the apparent owner of such furniture, such apparent owner afterwards appearing to be the agent intrusted with the custody of the furniture by the true owner. Such agent is not an agent, nor is such furniture, goods and merchandise within the meaning of stat. 5 & 6 Vict. c. 39. (x)]

Before leaving the subject of contracts by agents, I will advert to the topic which in a former lecture I reserved for this period, that, namely, of a wife's power to bind her husband by contract. Now it is a principle, as old as the time of Fitzherbert, (y) that, whenever a wife's contract made during marriage binds the husband, it is on the ground that she entered into it as his agent.¹ [Thus, where the plaintiff sold music to a married woman living with her husband, and sued the husband for the price, *and the only question [*355] left to the jury was, whether the music was necessary for the wife in her station, this was held

(t) *Jenkyns v. Osborne*, 7 M. & Gr. 679, E. C. L. R. vol. 49; *Van Casteel v. Booker*, 2 Exch. 691.

(u) *Monk v. Whittenbury*, 2 B. & Ad. 484, E. C. L. R. vol. 22.

(x) *Wood v. Rowcliffe*, 6 Hare, 191.

(y) *Fitz. Nat. Brev.* 27, C.; *Id.* 118, F.; *Id.* 120, G.

¹ *Sawyer v. Cutting*, 23 Vermont, 486; *Leeds v. Vail*, 15 Penna. State Rep. 185; *Alexander v. Miller*, 16 *Ibid.* 215; *Burk v. Howard*, 13 Missouri, 241; *Swett v. Penrice*, 24 Mississippi, 416.

wrong, as the question ought to have been, whether the wife had the husband's authority to purchase.(z)] Now, that she may be appointed his agent in the same way that any other individual may, either by express words or by implication, I have already mentioned; and you will find that illustrated by the late case of *M'George v. Egan*.(a) [In this case the defendant's wife had put her brother's child to school with the plaintiff. The defendant had occasionally visited the child at the school, and was in the habit of paying for a variety of articles ordered by his wife for the use of his house, and amongst them he had paid a carver and gilder's bill incurred by the wife. It was contended, that these facts afforded no inference that the defendant had authorized the wife to incur the debt claimed by the plaintiff. But the Court held, that it clearly was evidence of her having authority to contract that debt, although it was very slight. Thus also, where the plaintiff, in order to substantiate a demand for goods sold to the defendant, proved that he had a shop, in which his wife served and carried on the business of it in his absence, and that, on applying to her for [*356] the price of the goods, she *said she would pay it if he would allow 10*l.*, which she claimed, and give a receipt in full. The Court thought that this was evidence from which it might be presumed that the wife was acting within the scope of her authority when she offered to settle a demand for goods delivered at a shop in which she served, and the business of which she was in the habit of conducting.(b) But on the other hand, where she equally carried on the business of the shop by her

(z) *Reid v. Teakle*, 22 L. J. (C. P.) 161; 13 C. B. 627, E. C. L. R. vol. 76, S. C.; *Lane v. Ironmonger*, 13 M. & W. 368.

(a) 5 Bing. N. C. 196, E. C. L. R. vol. 35.

(b) *Clifford v. Burton*, 1 Bing. 199, E. C. L. R. vol. 8.

husband's authority, and attended to all the receipts and payments, a statement made by her that she would pay her rent on the day it would be due if it was remitted to her by her husband in time, and that the amount was 6*l.*, was held not to be evidence against her husband of the terms of his tenancy.^(c) The difference is obvious between the two cases; for, though the wife might be the agent of her husband to make payments, she is not on that account necessarily his agent to admit an antecedent contract. Therefore, if the admissibility of her statement be rested on the ground of its being evidence of an antecedent lease, it must fail. Neither does her agency to make payments constitute her an agent to take a lease for the benefit of her husband.]

I am not, however, now speaking of that sort of agency which is purely conventional, and in no way depends on the relation of husband to wife, inasmuch as it may be conferred on any one *else; but of [*357] another and a peculiar sort of agency, which is implied from the circumstance of two persons living together as man and wife, from which circumstance a presumption arises that the wife has authority to bind the husband by her contracts for necessities suitable to his fortune and rank of life.¹ This is very clearly

(c) *Meredith v. Footner*, 11 M. & W. 202.

¹ This agency (the existence of which is a question for the jury, *Lane v. Ironmonger*, 13 Mees. & Welsb. 368; *Casteel v. Castell*, 8 Blackford, 240), is, however, so far as necessities are concerned, to be presumed from the mere fact of cohabitation: *M'Cutcheon v. M'Gahey*, 11 Johnson, 281; *Fredd v. Eves*, 4 Harrington, 385; *Connerat v. Goldsmith*, 6 Georgia, 14; *Henderson v. Stringer*, 2 Dana, 292; so much so, that it matters not whether the woman be really the wife of the man sought to be charged, or only appear so to be, if he allow her to live with him and pass for his wife. *Watson v.*

explained by Lord Holt, in *Etherington v. Parrott* : (d) ["It is the cohabitation," he said, "that is an evidence of the husband's assent to contracts made by his wife for necessaries; but if the husband here solemnly declared his dissent that she shall not be trusted, any person that has notice of this dissent trusts her at his peril after; for the husband is only liable upon account of his own assent to the contracts of his wife, of which assent cohabitation causes a presumption; and when he has declared the contrary, there is no longer room for such a presumption, for the wife has no power originally to charge her husband, but is absolutely under his power and government, and must be content with what he provides; and if he does not provide necessaries, her remedy is in the Spiritual Court." And, indeed, as Mr. Smith states in his *Leading Cases*, (e) this is just; for when a tradesman sees two persons living together as man and wife, he naturally infers that there is that [*358] degree of *confidence and affection subsisting between them which would induce the one not to contract without authority, and the other to confer such authority for necessary purposes.] But then this must be taken subject to two observations: first, that the contract must be *for necessaries*; secondly, that the party making it must not have been forbidden to trust her.

Now, with regard to the question what are necessaries, it is a question which always and obviously depends upon the circumstances of the particular case

(d) *Ld. Raym.* 1006; *Waithman v. Wakefield*, 1 *Camp.* 120.

(e) 2 *Smith L. C.* 284.

Threlkeld, 2 *Esp.* 637; *Blades v. Free*, 9 *Barn. & Cress.* 167, 17 *E. C. L. R.*—R.

Furlong v. Hysom, 35 *Maine*, 332; *Wood v. O'Kelley*, 8 *Cushing*, 406; *Mitchell v. Treanor*, 11 *Georgia*, 324.

under discussion for the time being. [Servants, suitable to the husband's fortune and rank, have been held to be such necessities, in a case where the defendant was Governor of Barbadoes, and his wife, being about to quit England in order to join him there, engaged the plaintiff as her maid to accompany her on the voyage.(f)] The question is one which is continually arising, and of which there are many reported examples. Hunt v. De Blaquiere(g) [was an action to recover the value of furniture for a house supplied to defendant's wife, who was living separately from him under a sentence of divorce *a mensâ et thoro*, on the ground of adultery, against the husband, who was decreed to pay 380*l.* a year alimony, but did not pay it. It was contended, that furniture *for a house [*359] was not necessary for a divorced wife with an income of 380*l.* a year. The jury thought that the articles furnished were necessities, and the Court concurred in their opinion. The allowance to the wife must be sufficient, said Parke, J., according to the degree and circumstances of the husband. But if the wife have a sufficient separate maintenance, what is supplied to her cannot be necessities, and is not the more so because no part of it is supplied by the husband, but by others. He, therefore, is not in such case liable to pay for them.(h)] But the cases most frequently referred to on the subject are Montague v. Benedict(i) and Seaton v. Benedict.(k) The name of the defendant probably strikes you as fictitious, and in truth it is so, being taken from a play of Shakespeare, called "Much ado about Nothing," in which

(f) White v. Cuyler, 1 Esp. 200, 6 T. R. 176.

(g) 5 Bing. 550, E. C. L. R. vol. 15.

(h) Clifford v. Laton, M. & M. 101, E. C. L. R. vol. 22.

(i) 3 B. & C. 631, E. C. L. R. vol. 10.

(k) 5 Bing. 28, E. C. L. R. vol. 15.

one of the characters is a young officer named Benedict, who protests vehemently against marriage. The real defendant was a highly respectable professional gentleman; and it was sought in *Seaton v. Benedict* to charge him with a bill contracted by the lady for articles of millinery, of a very expensive description. It appeared at the trial that she was already supplied with all necessary articles of dress; and the Court held, on a motion for a new trial, that the defendant was in point of law entitled to the verdict.

[*360] *In the other case of *Montague v. Benedict*, the goods supplied were articles of jewelry, to the amount of 83*l.*, which had been delivered in the course of two months. The plaintiff's evidence was, that the defendant lived in a furnished house of which the rent was 200*l.* a year, and that the lady had a fortune of 4000*l.*; the defendant's, that the lady was already supplied with sufficient jewelry. The jury found a verdict for the plaintiff; but the Court set it aside, on the ground that there was no evidence to support it. Mr. J. Bayley said, "If the husband and wife live together, and the husband will not supply her with necessaries or the means of obtaining them, then, although she has her remedy in the Ecclesiastical Court, yet she is at liberty to pledge the credit of her husband for what is strictly necessary to her own support. But, whenever the husband and the wife are living together, and he provides her with necessaries, the husband is not bound by contracts of the wife, except where there is reasonable evidence to show that the wife has made the contract with his assent. Cohabitation is presumptive evidence of the assent of the husband, but it may be rebutted by contrary evidence;¹

¹ As, for instance, by showing that the tradesman gave credit to the wife herself: *Connerat v. Goldsmith*, 6 Georgia, 14.—R.

Swett v. Penrice, 24 Mississippi, 416.

and when such assent is proved, the wife is the agent of the husband duly authorized." [Indeed, the husband's assent during cohabitation, being thus presumed to be given to the wife's contracting for necessaries suitable to his degree, the suitability of the things contracted for is *evidently to be considered. [*361] It is because she is the agent of her husband, said Parke, B., in *Lane v. Ironmonger*,^(l) that the tradesman ought to be careful not to supply her to an extravagant extent. For, giving orders to such an extent would go to show she was not acting as the husband's agent, and to the extent authorized by him.]

The before-mentioned observations of Mr. J. Bayley support the latter of the two rules to which I adverted, namely, that the contract must not only be for necessaries suitable to the husband's fortune and degree, but that the person making it must not have been forbidden to contract with the wife on his account.

This point, indeed, had been decided long before by the majority of the Judges in the Exchequer Chamber in the case of *Manby v. Scott*.^(m) The discussions in this case were exceedingly long and elaborate; and as frequently happens in the old reports, the reasons given in some instances almost ludicrous: for instance, Mr. Justice Twisden, who was at first of opinion that it was not in the husband's power to prohibit another from trusting his wife for necessaries, gave as a reason, that, if he might prohibit one person, he might go on doing so till he had at last prohibited every one in England; and then, says he, if he were to join the [*362] *king's enemies his wife must go too, and then

(l) 13 M. & W. 368.

(m) 1 Lev. 4; 1 Siderfin, 109; 2 Smith L. C. 245; Bac. Abr. "Baron & Feme."

she would be hanged; or stay at home, and then she would be starved; which, he remarked, would be inconvenient. However, the majority of the Court were of opinion, that the husband may prohibit a particular person from trusting his wife even for necessities, and that, if he trust her in defiance of that prohibition, he cannot hold the husband liable.¹

The points which we have been hitherto considering all arise in cases in which the husband and wife continue to live together. But if the wife, when she makes the contract, is living separated from her husband, the case is quite different; and the only question is, whether the separation is with the husband's assent, or produced by the husband's misconduct. If the husband drive his wife from home, or if he so misconduct himself that it is morally impossible and unreasonable that she should continue to reside in his house, he sends her into the world with authority to pledge his credit for her necessary expenses. And this authority he cannot revoke or control by any notice or prohibition whatever. "If a man," said Lord Eldon in *Rawlyns v. Vandyke*,⁽ⁿ⁾ "will not

(n) 3 Esp. 251.

¹ It must not, however, be supposed that a husband will not be liable for necessities furnished the wife, when he, without fault on her part, refuses to supply her with them, even although he may have given notice not to trust her. It is only when he himself supplies her with necessities that a notice will be effectual to protect her: *Rotch v. Miles*, 2 Connect. 638; *Kimball v. Keyes*, 11 Wendell, 33; *Emery v. Neighbor*, 2 Halsted, 142; *Billing v. Pitcher*, 7 B. Monroc, 458; *Fredd v. Eves*, 4 Harrington, 385; and it would seem that in any case notice by newspaper is insufficient, unless it was proved to have reached the party who supplied the articles: *Fredd v. Eves*. In such cases as these the husband is liable without his assent, and hence his liability necessarily rests on other grounds than those springing from the law of principal and agent, as is clearly shown in the American note to *Manby v. Scott*, 2 Smith's Lead. Cases, 378.—R.

Harshaw v. Merryman, 18 Missouri, 106.

receive his wife into his house, or turns her out of doors, he sends her with credit for her reasonable expenses."—"Where a wife's situation in her husband's house," says Lord Kenyon in *Hodges v. [363]* **Hodges*, (o) "is rendered unsafe, from his cruelty and ill-treatment, I shall rule it to be equivalent to his turning her out of the house, and that the husband shall be liable for necessaries furnished to her under those circumstances." (p)¹

In like manner, if the husband and wife mutually consent to live apart, she has a right to bind him by contracting for her reasonable and necessary expenses as long as the consent continues. (q)² But in those cases in which the wife, living apart from her husband, has authority to bind him by contracts for necessaries, if he allow and pay her a sufficient main-

(o) 1 Esp. 441.

(p) See *Houlston v. Smyth*, 3 Bing. 127, E. C. L. R. vol. 11; *Bolton v. Prentice*, Str. 1214.

(q) *Hodgkinson v. Fletcher*, 4 Camp. 79; *Nurse v. Craig*, 2 N. R. 148.

¹ See also *Sykes v. Halstead*, 1 Sanford's S. C. R. 483; *Rutherford v. Coxe*, 11 Missouri, 347; *Evans v. Fisher*, 5 Gilman, 569; *Fredd v. Eves*, 4 Harrington, 385; *Pidgin v. Cram*, 8 N. Hamp. 350; *Clement v. Mattison*, 3 Richardson, 93. And it is not necessary that actual bodily cruelty should be used to her, as it has been held (overruling *Harwood v. Heffer*, 3 Taunton, 421) that if a husband, by bringing another woman to live under his roof as his mistress, thereby renders his house unfit for the residence of his wife, he is bound to provide her with necessaries during the separation: *Aldis v. Chapman*, T. T. 50 Geo. 3, cited 1 Selwyn's N. P. 272; *Houlston v. Smyth*, 3 Bing. 127, 11 E. C. L. R.; *Blowers v. Sturdevant*, 4 Denio, 49. As in the case of an infant, however, the husband is not liable for money lent to enable her to procure necessaries: *Walker v. Simpson*, 7 Watts & Serg. 88.—R.

² And not only for necessaries furnished to herself, but to the children of the marriage, if he suffer them to remain with her: *Rumney v. Keyes*, 7 N. Hamp. 571; *Kimball v. Keyes*, 11 Wend. 33.—R.

tenance, the authority is gone, and her contracts, even for necessities, will not bind him; the reason of which is, that the authority is given by law for the wife's protection, to save her from distress occasioned by her husband's misconduct; but if he make her a proper allowance, and pay it, there is no such danger; and then *cessante ratione cessat lex*;¹ see *Mizen v. Pick*; (r) which is the last case on this subject, and in which the Exchequer decided that it makes no difference, that the tradesman, when he trusts the wife, has no notice that her husband makes her an adequate allowance.²

Thus, you see that if the wife be driven from home [*364] by the husband's misconduct, or if they *separate by mutual consent, she carries with her an implied authority to pledge his credit so long as that separation continues, unless he pay her an allowance adequate to *her* support and his own means. But, when the separation is occasioned neither by his misconduct nor consent, the case is otherwise. In such case she has no authority at all to pledge her husband's credit, and the person who contracts with her does so at his peril.(s)³ And, where a married

(r) 3 M. & W. 481.

(s) *Hardie v. Grant*, 8 Car. & P. 512, E. C. L. R. vol. 34; *Morris v. Martin*, Str. 647.

¹ *Cany v. Patton*, 2 Ashmead, 140; *Baker v. Barney*, 8 Johns. 72; *Fenner v. Lewis*, 10 Id. 38; *Mott v. Comstock*, 8 Wendell, 544; *Kimball v. Keyes*, 11 Id. 33.—R.

² The same point had been so previously decided in this country in *Cany v. Patton*, 2 Ashmead, 140.—R.

³ And it is immaterial whether he does or does not know of the wife's having left her husband: *Hunter v. Boucher*, 3 Pick. 289; *M'Cutchen v. M'Gahay*, 11 Johns. 281; *Walker v. Simpson*, 7 Watts & Serg. 88; *Evans v. Fisher*, 5 Gilman, 569. The rule admits of no exception, of course, in the case of necessities: *Williams v. Prince*, 3 Strobbart, 490. And even if the husband and wife have separated by mutual consent, and the wife goes to live in the house of a third

woman is found living apart from her husband, the *prima facie* presumption is, that it is neither in consequence of his improper conduct nor by his assent; and therefore, it always lies on the person who gave her credit to show what were the circumstances under which they separated. (t)

It only remains to observe, that, where the wife, in consequence of the circumstances under which she separated from her husband, has authority to bind him by contracts, those contracts must be for necessities suitable to his rank and means. What *are* such necessities, is a question which of course turns on the particular circumstances of each case. (u) There are two of the latest cases involving rather singular questions: *Turner v. Rookes*, (x) *and *Grindell v. Godmond*. (y) In *Turner v. Rookes*, the husband and wife were living separate by consent, under

(t) *Reed v. Moore*, 5 Car. & P. 200, E. C. L. R. vol. 24; *Mainwaring v. Leslie*, M. & M. 18.

(u) *Hunt v. De Blaquiére*, 5 Bing. 550, E. C. L. R. vol. 15; *Ewers v. Hutton*, 3 Esp. 255.

(x) 10 A. & E. 47, E. C. L. R. vol. 37.

(y) 5 A. & E. 755, E. C. L. R. vol. 31.

person, with whom the husband makes a contract to support her, if she leave the house of that person voluntarily and without just cause, she will carry with her no authority to pledge his credit for her support, though if she were driven from that house by improper usage it would be different: *Pidgin v. Cram*, 9 N. Hampshire, 350. In case, however, the wife should return to her husband, or even should in good faith offer to return to him (and the question of such good faith is one upon the evidence for the jury: *Cunningham v. Irwin*, 7 Serg. & Rawle, 259), his liability is revived from the time of such return or offer: *Harris v. Morris*, 4 Esp. 42; *M'Gahay v. Williams*, 12 Johnson, 293; *Henderson v. Stringer*, 2 Dana, 292; *Rennick v. Ficklin*, 3 B. Monroe, 166; *Cunningham v. Irwin*, *supra*; *Blowers v. Sturdevant*, 4 Denio, 45. The husband is not, however, liable for anything furnished to the wife during the interval between her leaving him, and her return: *Williams v. Prince*, 3 Strobhart, 490.—R.

a deed of separation, by which she had a separate maintenance of 112*l.* a year; so that, as long as that was paid, she would have no authority to bind the husband for necessaries of an ordinary description; but it appeared, that the husband had used threats of violence towards her, which occasioned her so much alarm that she thought it necessary to exhibit articles of the peace against him. In order to do this, she was obliged to employ an attorney; and not being able to pay his bill of costs, he brought his action to recover it against the husband. The Court held, that the proceeding was necessary for the wife's safety; and, therefore, that she had a right to bind the husband by contracting for it; and that, though the maintenance allowed her might be sufficient for ordinary purposes, yet this was an extraordinary contingency not likely to have been contemplated in arranging the amount of maintenance, and which therefore was not covered by it; and they held the husband liable, as having through his wife employed the attorney to exhibit articles of the peace against himself.

The other case was one in which the husband had assaulted and ill-treated his wife, who preferred an [*366] indictment against him at the Beverley sessions; *upon which he was convicted, and sentenced to twelve months' imprisonment, and a fine of 50*l.* The attorney, who conducted the prosecution, thinking, very correctly, that if he carried it on without funds, he would have no remedy against any one, required money in hand, which the lady borrowed from her brother, and he brought an action against the husband to be reimbursed. But the Court thought, that though it might be necessary that she should exhibit articles of the peace for her own personal security, yet that it could not be necessary that she should assume the

offensive, and prefer an indictment against him; and consequently, that the plaintiff was not entitled to recover.

The whole of this branch of the law may be shortly summed up thus: while a wife continues to live with her husband, the presumption is that she has authority to bind him by contracting for necessaries: but that presumption is subject to be rebutted. When she is living separately from him, the presumption is, that she has no such authority: but that presumption also is subject to be rebutted, by showing that the separation was by consent, or occasioned by the husband's misconduct; in which cases, if he leave her without adequate funds for her support, she has a right to pledge his credit by contracting for necessaries.

I have gone through the subject which I proposed at the commencement of these lectures, with the exception of the last point. I have mentioned *the [*367] different sorts of contracts, the peculiarities of those by record, by writing sealed and delivered, and writing not under seal; of the consideration which a simple contract requires to support it; of the effect of illegality, whether by common or statute law, in invalidating contracts; of the competency of the parties, and of the rules which govern contracts entered into by those parties through the medium of agents.

It remains to point out, in a few words, the *remedies* by which the observance of contracts may be enforced, and their non-observance punished. Now, I say nothing about the remedy in Courts of equity. *There* a specific performance may, as you know, in many cases, be compelled; there was no such thing as a specific performance to be had in a Court of law, except in the cases to which the writ of mandamus was applicable, which could, however, never be obtained when there was any

other remedy. [Now, however, by the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 68, the plaintiff in any action in any of the superior Courts, except replevin and ejectment, may indorse upon the writ and copy to be served a notice that the plaintiff intends to claim a writ of mandamus, and the plaintiff may thereupon claim in the declaration, either together with any other demand, which may now be enforced in such action, or separately, a writ of mandamus commanding the defendant to fulfil any duty, in the [*368] *fulfilment of which the plaintiff is personally interested.

[S. 69. The declaration in such action shall set forth sufficient grounds upon which such claim is founded ; and shall set forth that the plaintiff is personally interested therein ; and that he sustains, or may sustain, damage by the non-performance of such duty ; and that performance thereof has been demanded of him and refused or neglected.

[S. 70. The pleadings and other proceedings in any action in which a writ of mandamus is claimed, shall be the same in all respects as nearly as may be, and costs shall be recoverable by either party, as in an ordinary action for the recovery of damages.

[S. 71. In case judgment shall be given to the plaintiff that a mandamus do issue, it shall be lawful for the Court in which such judgment is given, if it shall see fit, besides issuing execution in the ordinary way for the costs and damages, also to issue a peremptory writ of mandamus to the defendant, commanding him forthwith to perform the duty to be enforced.

[S. 72. The writ need not recite the declaration or other proceedings, or the matter therein stated, but shall simply command the performance of the duty, and in other respects shall be in the form of an ordi-

nary writ of execution, except that it shall be directed to the party and not to the sheriff, and may be issued in term or vacation, and returnable forthwith; and no return thereto, except that of *compliance, shall [*369] be allowed; but time to return it may, upon sufficient grounds, be allowed by the Court or a Judge, either with or without terms.

[S. 73. The writ of mandamus so issued as aforesaid shall have the same force and effect as a peremptory writ of mandamus issued out of the Court of Queen's Bench, and, in case of disobedience, may be enforced by attachment.

[S. 74. The Court may, upon application by the plaintiff, besides or instead of proceeding against the disobedient party by attachment, direct, that the act required to be done may be done by the plaintiff or some other person appointed by the Court at the expense of the defendant; and, upon the act being done, the amount of such expense may be ascertained by the Court, either by writ of inquiry or reference to a Master, as the Court or Judge may order; and the Court may order payment of the amount of such expenses and costs, and enforce payment thereof by execution.

[S. 78. The Court or a Judge shall have power, if they or he think fit so to do, upon the application of the plaintiff in any action for the detention of any chattel, to order that execution shall issue for the return of the chattel detained, without giving the defendant the option of retaining such chattel upon paying the value assessed; and that, if the said chattel cannot be found, and unless the *Court or Judge [*370] should otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the said sheriff's bailiwick, till the defendant render

such chattel; or, at the option of the plaintiff, that he cause to be made of the defendant's goods the assessed value of such chattel; provided that the plaintiff shall, either by the same or separate writ of execution, be entitled to have made of the defendant's goods, the damages, costs, and interest in such action.

[S. 79. In all cases of breach of contracts, or other injury, where the party injured is entitled to maintain and has brought an action, he may in like case and manner, as hereinbefore provided with respect to mandamus, claim a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the committal of any breach of contract or injury of a like kind, arising out of the same contract or relating to the same property or right; and he may also, in the same action, include a claim for damages or other redress.

[S. 80. The writ of summons in such action shall be in the same form as the writ of summons in any personal action; but on every such writ and copy thereof, there shall be indorsed a notice, that, in default of appearance, the plaintiff may, besides proceeding to judgment and execution for damages and costs, apply for and obtain a writ of injunction.

[*371] * [S. 81. The proceedings in such action shall be the same, as nearly as may be, and subject to the like control, as the proceedings in an action to obtain a mandamus under the provisions hereinbefore contained; and in such action judgment may be given that the writ of injunction do or do not issue, as justice may require; and in case of disobedience, such writ of injunction may be enforced by attachment by the Court, or, when such Court shall not be sitting, by a Judge.

[S. 82. It shall be lawful for the plaintiff at any time after the commencement of the action, and

whether before or after judgment, to apply *ex parte* to the Court or a Judge for a writ of injunction to restrain the defendant in such action from the repetition or continuance of the wrongful act or breach of contract complained of, or the committal of any breach of contract or injury of a like kind arising out of the same contract, or relating to some property or right; and such writ may be granted or denied by the Court or Judge, upon such terms as to the duration of the writ, keeping an account, giving security, or otherwise, as to such Court or Judge shall seem reasonable and just; and in case of disobedience, such writ may be enforced by attachment by the Court, or, when such Court shall not be sitting, by a Judge. Provided always, that any order for a writ of injunction made by a Judge, or any writ issued by virtue thereof, may be discharged or varied or set aside by the Court on *application made thereto by any party dis- [*372]
satisfied with such order.

[S. 83. It shall be lawful for the defendant or plaintiff in replevin in any cause, in any of the superior Courts, in which, if judgment were obtained, he would be entitled to relief against such judgment on equitable grounds, to plead the facts which entitled him to relief by way of defence; and the said Courts are hereby empowered to receive such defence by way of plea, provided that such plea shall begin with the words, "For defence on equitable grounds," or words to the like effect.

[S. 84. Any such matter which, if it arise before or during the time for pleading, would be an answer to the action by way of plea, may, if it arise after the lapse of the period during which it could be pleaded, be set up by way of *auditâ querelâ*.

[S. 85. The plaintiff may reply, in answer to any

plea of the defendant, facts which avoid such plea upon equitable grounds, provided that such replication shall begin with the words, "For replication on equitable grounds," or words to the like effect.

[S. 86. Provided always, that in case it shall appear to the Court or any Judge thereof, that any such equitable plea or equitable replication cannot be dealt with by a Court of law, so as to do justice between the parties, it shall be lawful for such Court or Judge to order the same to be struck out, on such terms, as to costs and otherwise, as to such Court or Judge shall seem reasonable.

[*373] * [S. 87. In case of any action founded upon a bill of exchange or other negotiable instrument, it shall be lawful for the Court or Judge, to order that the loss of such instrument shall not be set up, provided an indemnity is given to the satisfaction of Court or Judge, or a Master, against the claims of any other person upon such negotiable instrument.

[It is clear, therefore, that specific performance may now in many cases be compelled in Courts of law, and that injustice may in other cases be prevented, where formerly it could only be compensated for. And there can be no doubt, that very important changes of practice will follow these alterations in the power of the Courts of law. But at present, too little illustration of these enactments has been derived from adjudged cases to justify the expectation that any profitable comments could be made upon them within the limited scope of this book.]

The ordinary remedy in a Court of law for breach of contract still is by *action*,—and there are distinct forms of action applicable to the breach of distinct species of contract.

If the contract be by record, the remedy is by writ

of scire facias, which lies only upon a record, and which has obtained its name from the Latin words it formerly contained, commanding the sheriff to make the defendant know that the Court commanded his appearance to answer why execution should not issue against him. [But, in the cases in which, by reason of lapse of time or *change of parties since a judgment had been obtained, the proceeding was formerly by sci. fa., the parties may now have the same benefit by a suggestion entered by leave of the Court upon the roll, or by a writ of revivor. This is by virtue of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76, s. 129.] [*374]

If the record create a debt, that is, render a sum certain payable by the one party to the other, an action of debt will lie to enforce payment, if the plaintiff prefer that form of proceeding to a scire facias.

The action of debt lies in every case where there is a liquidated pecuniary duty from one person to another [in which case judgment by default is final.(z)]

If the contract be by deed, the remedy is by action of covenant, which lies to enforce a contract by deed, [for which it is the only remedy at common law,] unless the contract be for payment of a liquidated sum, in which case, as I have already said, the plaintiff may, if he prefer it, maintain an action of debt. If the contract be neither by record nor by deed,—if, in other words, it be a simple contract, either reduced to writing, or by mere words without writing,—the remedy, unless it be for payment of money, in which case debt also will lie, is by an action of *assumpsit*. This was originally a sort of action of trespass upon *the case, and was called *assumpsit* from the words [*375]

(z) 15 & 16 Vict. c. 76, s. 93.

“undertook and promised,” which always appeared in the declaration. When the Uniformity of Process Act(a) was passed, the schedule contained a form of writ in which it was described as an action on promises; in consequence of which it is now most commonly denominated *an action on promises*. It is the great remedy upon the breach of simple contracts.

There is, besides, a sort of action called an action of *account*, which was for a long time almost completely obsolete and disused, but has recently risen again into some importance in consequence of a decision of the Court of Exchequer(b). [But this species of action seems likely to become totally disused, in consequence partly of the greater use now made of arbitration, but chiefly in consequence of the provision in the Common Law Procedure Act, 1854,(c), that if, after a writ has been issued, it be made to appear to the satisfaction of the Court or a Judge, upon the application of either party, that the matter in dispute consists wholly or in part of matters of mere account, which cannot conveniently be tried in the ordinary way, the Court or Judge may decide such matter in a summary manner, or order that such matter, either wholly or in part, be [*376] referred to an *arbitrator appointed by the parties, or to an officer of the Court, or in country causes to the Judge of any County Court; and the decision or order of the Court or Judge, or the award or certificate of such referee, shall be enforceable by the same process as the finding of a jury upon the matters referred.]

Now these being the remedies by which contracts are enforced in Courts of law, the next question is, as

(a) 2 & 3 Will. 4, c. 39. (b) *Inglis v. Haigh*, 8 M. & W. 769.

(c) 17 & 18 Vict. c. 125, s. 3.

to the *time* within which those remedies are to be pursued and those times depend upon the provisions of the Acts of Parliament which we call *Statutes of Limitation*.

The policy of the Legislature in enacting such statutes, and thereby constituting a time after the lapse of which engagements shall be no longer capable of being enforced, has always been considered unexceptionable.

When you find a debt or an engagement existing after the lapse of a long period of time, it is possible, indeed, that strict justice may require its enforcement, but it is also possible that great injustice may be done by enforcing it. Suppose, for instance, an executor finds a bond forty years old in his testator's repository, it may be that the principal and interest are due and unpaid; but it may also be that they have been paid, or that great part has been paid, and that the vouchers have been lost; or it may be that the bond was deposited with the testator as a collateral security, *and that no liability ever in reality accrued [*377] upon it, but that the obligee forgot to reclaim it, or died pending the suretyship, leaving his representatives in ignorance of the transaction. It may be quite impossible, after the lapse of forty years, to prove this. Indeed, it may be in the knowledge of no person living. Now, there would be the greatest hardship in calling upon a man, after the lapse of an indefinite space of time, to defend himself against such a demand; but there is no great hardship imposed on the obligee by requiring him to enforce his claim within a reasonable time, if he intend to enforce it at all.

This, then, is the policy of the Statutes of Limitation—to prevent obsolete claims from being raked up. And now as to the time which the Legislature has appointed for the purpose of pursuing the several remedies of which I have spoken.

With regard to *scire facias*, there was, for a long while, no limitation imposed by statute to the commencement of that proceeding; but now, by 3 & 4 Will. 4, c. 42, s. 3, a *scire facias* on a recognizance must be sued out within twenty years. [After the recovery of a judgment, and during the lives of the parties to it, execution may issue within six years, without reviving the judgment: 15 & 16 Vict. c. 76, s. 128. Afterwards the judgment must be revived by writ of revivor, sect. 129. This writ, if the judgment be less than ten years old, does not need any rule or [*378] order to authorize its issue; but if the judgment be more than ten years old, a rule of Court or Judge's order is necessary; and if more than fifteen years old, a rule to show cause.]

An action of debt founded upon a contract made by deed was not formerly subject to any limitation in respect of the time within which it might be commenced: not that you are to suppose that there was *practically* no security against an obsolete claim founded on a deed, for the Courts had introduced a presumption that such claims were satisfied after the lapse of twenty years; and if no evidence of any acknowledgment of the existence of the claim appeared to have taken place within that time, they recommended the jury to presume payment or a release, as the nature of the case happened to require; but there was no statute which could be pleaded in bar of such action until the 3 & 4 Will. 4, c. 42, the 3d section of which establishes the limitation of twenty years, and is as follows:—

“That all actions of debt for *rent upon an indenture of demise*, all actions of *covenant or debt upon any bond or other specialty*, and all actions of debt or *scire facias* upon any *recognizance*, and also all actions of debt upon

any *award* where the submission is not by specialty, or for any *fine* due in respect of any copyhold estates, or for an *escape*, or for *money levied on any fieri facias*, and all actions for any penalties, damages, *or [*379] sums of money given to the *party grieved*, by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of Parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise or covenant, or debt upon any bond or other specialty, actions of debt or *scire facias* upon recognizance, *within ten years after the end of this present session* [A.D. 1833], *or within twenty years after the cause of such actions or suits, but not after.*"

[It will be observed that the periods of limitation begin to run from the cause of such actions or suits; and for this reason, where it is sought to investigate the question when a cause of action has accrued, recourse is very commonly had to the decisions upon the statutes of limitations. To an action of debt on a bond, the defendant pleaded that the cause of action did not accrue at any time within twenty years next before the commencement of the suit, and the issue raised for trial was upon a traverse of this averment. On the bond being produced at the trial, it appeared to be a post obit bond, and it was proved that the party upon whose death the sum secured thereby was made payable died within twenty years. It was held that the verdict ought to be for the plaintiff.(d) "What *does [*380] the Legislature mean," said Wilde, C. J., "by the cause of action. The object of the Statute of Limitations was to prevent parties being harassed by stale demands, brought forward against them at a period

(d) Tuckey v. Hawkins, 4 C. B. 655, E. C. L. R. vol. 56.

when all their witnesses might reasonably be presumed to be dead, and when the circumstance of the plaintiff's having lain by so long without challenging them to make payment, afforded fair ground for presuming that the debt had been paid. The Legislature thought twenty years a convenient period, beyond which the obligor in a bond ought to be relieved from the necessity of preserving evidence in discharge of his liability. Bearing in mind, therefore, that the sole object of the Legislature was to discharge parties from demands that might and ought to have been enforced at an earlier period, we have plain means of ascertaining the intention with which they used the words 'cause of action,' that is, a cause of action capable of being enforced. We must read the words 'debt' and 'cause of action' in the plea, in the same sense in which the statute makes such a plea a bar to the action. What then is the meaning of this plea? That the action might have been brought more than twenty years before it was brought." Now, inasmuch as the non-commencement of the action within twenty years is a matter which the defendant is privileged to set up as a defence, and the plaintiff meets that by replying "that the cause of action did accrue within twenty years," the accruing [*381] *of the cause of action being the point from which the time begins to run within which an action may be brought, the Court held, that even the concealment of the accruing of the cause of action does not prevent this time from beginning to run from the same point, and that even the fraudulent concealment of the fact will not prevent the period of limitation from elapsing.^(e) In the Courts of Chancery,^(f) in most

(e) *Imperial Gas Co. v. London Gas Co.* 23 L. J. (Exch.) 303; 10 Exch. 39, S. C.

(f) *Blair v. Bromley*, 16 L. J. (Chanc.) 105; 5 Hare, 542, S. C.; *Smith v. Pococke*, 23 L. J. (Chanc.) 545.

cases, this injustice would be prevented, a difference in the administration of the law, arising from the different modes of administering relief, which have hitherto prevailed in those Courts. But if a bond be conditioned to do various things, the first breach of one of those conditions is not, as will readily be supposed, such an accruing of the cause of action on the bond, as will prevent the obligee from suing for subsequent breaches of the obligation to do other of those things, any more than it would be confined to that period from the first breach of a covenant to do such things.(g)]

The action of *covenant* is liable to the same observations as the action of debt founded on a deed; the same section of 3 & 4 Will. 4, c. 42, has (as you will observe) applied the limitation of twenty years to it also.

*Now, from these limitations thus introduced by 3 & 4 Will. 4, c. 42, there are certain ex-^[*382]cepted cases.

In the first place, by the 4th section of the Act, if the person entitled to bring the action, be an infant, a married woman, an insane person, or beyond the seas at the time when the right of action accrues, the time runs not from the accrual of the right of action, but from the removal of disability, as it is called.

In the second place, if the defendant be beyond seas, the time runs from his return: that is also by the Act.

In the third place, if an acknowledgment of the liability be given in writing, signed by the person liable or his agent, the time runs from the date of that acknowledgment. This is by sect. 5. [It is important, therefore, to ascertain what is sufficient to constitute such an acknowledgment. It is required by the

statute to be made by writing, signed by the party liable by virtue of such indenture, specialty, or recognizance, or by his agent. Where the acknowledgment is expressly made for the purpose of preventing the operation of the statute, no difficulty arises. But, where admissions have been made for other purposes, and it is sought to convert them into equivalents for the acknowledgment required by the statute, some nicety occurs, as it always does, when a question of [*383] equivalents arises. Thus, where an action was *brought by an executor on a covenant in an indenture of mortgage executed by the defendant to the testator in June, 1824, to secure payment of the money borrowed and interest, and the defendant relied upon the lapse of time as a defence, the plaintiff attempted to prove an acknowledgment by giving in evidence a deed executed within twenty years by the defendant. The deed recited the execution of the mortgage by the defendant to the testator, for securing certain money and interest, and stated that he conveyed the property mortgaged with other things to trustees to sell, and to pay out of the proceeds the mortgage and other incumbrances on the property; and the Court of Exchequer held, that this was not such an acknowledgment as was required by the statute, (*h*) not being an admission of any existing debt. On the other hand, where the action was on a covenant in a mortgage deed, to pay the plaintiff principal and interest on the 1st November, 1830; and the question on a defence of the Statute of Limitations was upon the fact of an acknowledgment of the debt; the plaintiff proved a deed of conveyance from the defendant to Thompson of the equity of redemption in the premises mortgaged. It was dated within twenty

(*h*) *Howcutt v. Bonser*, 3 Exch. 491.

years, and, after reciting the mortgage deed, recited also that the principal sum still remained due by virtue of that deed, all the *interest having been paid [*384] up to the date. It also contained a covenant by Thompson with the defendant to pay the principal and interest, and to indemnify the defendant in case he should be called upon to pay them. The deed, said the Court, furnishes ample evidence, that all interest was paid up to the date stated, for the fact is expressly recited, and the date is within twenty years.(i)]

In the fourth place, if there have been a part payment, either of principal or interest, the time runs from such payment: this is also by sect. 5.(k)

In the fifth place, if an action have been brought and the defendant outlawed, or judgment obtained against him, and arrested or reversed by writ of error, a new action may be commenced within a year after the reversal of the outlawry or of the judgment: this is by sect. 6.

Such is the statutable time of limitation in actions on specialties, which, you will have observed, is now in every case twenty years, subject to the above exceptions. Now with regard to simple contracts:

The limitation of time in cases of actions upon simple contracts, whether brought in the form of debt or of *assumpsit*, depends upon stat. 21 Jac. 1, c. 16, which applies both to *assumpsit* and to *debt* on *simple contract*. The words of the Act are, “that *all actions of account and upon the case (other than such ac- [*385] counts as concern the trade of merchandise between merchant and merchant, their factors or servants), and all actions of debt grounded upon any lending or contract without specialty, and all actions of debt for ar-

(i) *Forsyth v. Bristowe*, 22 L. J. (Exch.) 255; 8 Exch. 347, S. C.

(k) See last-mentioned case.

rearages of rent, shall be commenced and sued within six years next after the cause of such action or suit, and not after." *Assumpsit*, as I have explained to you, was originally a species of action on the case.^(l) It therefore falls within the limitation prescribed by this statute, the period limited by which is, as you probably know, *six years*.

All actions upon simple contracts must therefore be commenced within *six years*, unless they fall within certain classes excepted from the operation of the statute of James I.

In the first place, that statute itself excepts^(m) the cases of the person entitled to the action being an infant, married, insane, imprisoned, or beyond seas at the time of the accruing of the right, and gives six years from the removal of the disability.

[It had been doubted, whether this proviso applied to the case of a foreigner living abroad, because, if he came to England without having been here before, he could not be said to have *returned from be-
[*386] yond seas; and consequently, there being no period from which the exceptional six years could, in his case, run, he was not within the proviso of the statute, and must therefore bring his action within six years from the time of the cause of action accruing. But the Common Pleas held that the statute of limitations does not apply to a foreigner, and the Chief Justice Jervis said, "I do not think the fair meaning of the word 'return' is, to refer it to the coming back of persons who have been here before; I think the meaning of the proviso is, that an action shall not be commenced after six years, but if the plaintiff was abroad when the right of action accrued, then when he comes

(l) *Battley v. Faulkner*, 3 B. & Ald. 294, per Holroyd, J.

(m) Sect. 7.

to England the statute is to begin to run against him.”(o)]

In the second place, it also contains the exception which I have just cited with regard to actions upon specialties, in the case of the defendant being outlawed,(p) or the judgment reversed or arrested. Indeed, the one is copied from the other.

In the third place, if the *defendant* be beyond seas when the right accrued, the plaintiff has six years after his return, not by the statute of James, but by stat. 4 Anne, c. 16, s. 19;(q) but it is a singular thing, that “beyond seas” does not mean the same thing in this Act of Parliament as in the Acts *of [*387] James and William 4; for by 3 & 4 Will. 4, c. 42, s. 7, it is directed that no part of the United Kingdom, or of Guernsey, Jersey, Alderney, Sark, or Man, shall be considered beyond seas, within the meaning of that Act or of the Act of James 1; but, as the statute of Anne is not mentioned, it is held that the words “beyond seas” used in that Act retain their common law meaning, which was literally beyond the sea surrounding Great Britain; and therefore the Exchequer has decided in *Lane v. Bennett*,(r) that Ireland is not within the statute of Anne, and that the plaintiff has still six years in which to bring his action after the return of the defendant, who has been in that part of the United Kingdom ever since the cause of action accrued. And here I may as well observe to you, that, in every case of a Statute of Limitations, if

(o) *Lafond v. Radock*, 22 L. J. (C. P.) 217; 13 C. B. 813, S. C. E. C. L. R. vol. 76; *Strithorst v. Græme*, 3 Wils. 145; *Williams v. Jones*, 13 East, 439.

(p) Sect. 4.

(q) *Fannin v. Anderson*, 7 Q. B. 811, E. C. L. R. vol. 53.

(r) 1 M. & W. 70. See *Battersby v. Kirk*, 2 Bing. N. C. 584, E. C. L. R. vol. 29.

once the time of limitation begins to run, nothing that happens afterwards will stop it.^(s)

[There is, moreover, a very important distinction between co-plaintiffs and co-defendants. It is clear that a sole plaintiff may, if he choose, bring his action while abroad or wait till his return, when the statute begins to run;^(t) and co-plaintiffs, if some be abroad and others in England, must sue within six years from [*388] the cause of action *accruing;^(u) but where one of two co-contractors who is a defendant, is beyond seas, the statute does not run; for it has been decided,^(v) that although the statute commences to run when the right of action accrues, where there are several joint *claimants*, and one of them is within seas, yet where there are joint *debtors*, and one of them is abroad when the cause of action arises, the statute does not begin to run until his return. Thus the important distinction I have mentioned between the position of co-plaintiffs and co-defendants arises. This distinction is founded upon the wording of the 19th sect. of the statute of Anne, c. 16, compared with the 21 Jac. 1, c. 16; and the reason of it seems to be, that one plaintiff can act for others and use their names in an action, and therefore the protection of the statute is not wanted. With respect to defendants, however, the reason does not apply; the plaintiff cannot bring the absent defendant into Court by any act of his, and therefore, if he be compelled to sue those who are within seas without joining those who are abroad, he may possibly recover against insolvent persons, and

(s) *Smith v. Hill*, 1 Wils. 134; *Rhodes v. Smethurst*, 6 M. & W. 351.

(t) *La Vaux v. Berkeley*, 5 Q. B. 836, E. C. L. R. vol. 48.

(u) 2 Wms. Saund. 121. See *Perry v. Jackson*, 4 T. R. 517; *Strithorst v. Græme*, 3 Wils. 145.

(v) *Fannin v. Anderson*, *supra*.

lose his remedy against the solvent ones who are absent. On the other hand, if he sue out a writ against all, and either continues it without declaring, or proceeds to outlawry against the absent parties, and declares against those within seas, *he is placed in precisely the same situation as if the statute of Anne had never passed, and is obliged to incur fruitless expense, the avoiding of which seems to have been the object of the statute of Anne.] [*389]

In the fourth place, if the defendant have given an acknowledgment *by writing signed*, the protection of the statute is removed. After the passing of the statute of James, and until Lord Tenterden's Act, which I shall immediately mention, an acknowledgment by mere words would have been sufficient; but, by that, which is the 9 Geo. 4, c. 14, the acknowledgment must be in *writing*, "signed by the party chargeable."¹ It

¹ Statutes like that of 9 Geo. 4, c. 14, have been enacted in Maine, Massachusetss, New York, Mississippi, Arkansas, and perhaps in some of the other States: Colburne v. Averill, 30 Maine, 310; Williams v. Gridley, 9 Metcalf, 485; Wadsworth v. Thomas, 7 Barb. S. C. 445; Thornton v. Crisp, 14 Smedes & Marsh, 52; Ringgold v. Dunn, 3 Eng. 497. Apart from the operation of such statutes, it is now very generally held, on both sides of the Atlantic, that the fullest acknowledgment of a debt is not sufficient to take the case out of the limitation acts, if such acknowledgment be accompanied with expressions inconsistent with a definite promise to pay. Thus, a promise to make an arrangement to pay will not be sufficient, as it shows that the defendant instead of being willing to pay the debt as it stands, contemplates paying it in some other manner: Kensington Bank v. Patton, 2 Harris, 479; Morgan v. Walton, 4 Barr, 322; Oakes v. Mitchell, 15 Maine, 360. So of the statement of a debt in an insolvent petition, for the circumstances under which it is made are inconsistent with an immediate provision of payment: Christy v. Flemington, 10 Barr, 129. Such a statement as "I owe the debt, but won't pay it," which would be, under the older decisions, entirely sufficient to take the case out of the statute, would at the present day be wholly insufficient: Moore v. Bank of Columbia, 6 Peters, 92;

enacts "that no acknowledgment or promise *by words only* shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors, or administrators of any contractor, no such joint contractor, executor, or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by *any other or others of them*; provided always, that nothing herein contained shall alter or take away, or lessen the effect of any payment of any principal or interest [*390] made **by any person whatsoever*: provided also, that in actions to be commenced against

Sigourney v. Drury, 14 Pick. 390; Barnard v. Bartholemew, 22 Id. 291; Munford v. Freeman, 7 Metcalf, 432; Allen v. Webster, 15 Wendell, 284; Berghaus v. Calhoun, 6 Watts, 220; Allison v. James, 9 Id. 381; Kensington Bank v. Patton, *supra*; Carruth v. Paige, 22 Vermont, 179 (approving Phelps v. Stewart, 12 Id. 256); Ventris v. Shaw, 14 New. Hamp. 422; Burton v. Wharton, 4 Harrington, 296; Gardner v. M'Mahon, 3 Queen's Bench, 561; Hart v. Prendergast, 14 Mees. & Wels. 741.—R.

Sherman v. Wakeham, 11 Barbour Sup. Ct. 254; Harbold v. Kurtz, 16 Penna. State Rep. 21; Hazlebaker v. Reeves, 12 Ibid. 264; Patterson v. Cobb, 4 Florida, 481; Ayers v. Richards, 12 Illinois, 146; Gillingham v. Gillingham, 17 Penna. State Rep. 302; Bell v. Crawford, 8 Grattan, 110; Moore v. Hyman, 13 Iredell, 272; Bixley v. Gayle, 19 Alabama, 151; Bryan v. Ware, 20 Ibid. 687; Grant v. Ashley, 7 English, 762; Ten Eyck v. Wing, 1 Manning, 40; Brainard v. Buck, 25 Vermont, 573; Deloach v. Turner, 6 Richardson, 117; Poole v. Relfe, 23 Alabama, 701; Mitchell v. Clay, 8 Texas, 443; Guy v. Tams, 6 Gill, 82.

two or more such joint-contractors, or executors, or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited Acts or this Act, as to one or more of such joint-contractors, or executors, or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment, or promise, or otherwise, judgment may be given and costs allowed for the plaintiff, as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

[No part of the statute has given rise to more litigation than this saving clause. It is now settled that the acknowledgment, in order to bar the statute, must contain an unconditional promise to pay, but the law implies such promise from an acknowledgment of the debt;—an acknowledgment or admission so distinct that a promise to pay may be reasonably inferred from it.

[Many of the older cases hold a different doctrine.(x) These, however, are expressly overruled by the leading case of *Tanner v. Smart*,(y) where, in an elaborate judgment, Lord Tenterden, C. J., says, "The only principle upon which it (an acknowledgment) can be held to be an answer to the *statute is this, [*391] that an acknowledgment is evidence of a new promise, and as such constitutes a new cause of action, and supports and establishes the promises which the declaration states. Upon this principle, whenever the acknowledgment supports any of the promises in the

(x) *Yea v. Fouraker*, 2 Burr. 1099; *Thornton v. Illingworth*, 2 B. & C. 824, E. C. L. R. vol. 9.

(y) 6 B. & C. 603, E. C. L. R. vol. 13; *Turney v. Dodwell*, 23 L. J. (Q. B.) 137; 3 E. & B. 136, S. C.; E. C. L. R. vol. 77.

declaration the plaintiff succeeds: when it does not support them, *though it may show clearly that the debt has never been paid, but is still a subsisting debt*, the plaintiff fails." This decision was based chiefly on that of *Heyling v. Hastings*,^(z) one of the oldest cases on the statute, and has been recognized and cited in almost every subsequent case on the point.^(a)

[As long as the doctrine prevailed, that it sufficed to show an acknowledgment which rebutted the presumption arising from the lapse of time that the claim was satisfied, it was not only immaterial whether a promise were made or not, but a condition with which such promise, if made, might chance to be coupled, would nowise have defeated the effect and virtue of the acknowledgment: for the acknowledgment was held to be in itself a bar to the statute, and no promise, either express or implied, was required. In *Dowthwaite v. Tibbut*,^(b) the debtor said, he "*would not*," and in *Leaper v. *Tatton*,^(c) he "*could not*" pay; and yet in both they were held to have sufficiently admitted the debt. But according to the doctrine now adopted from *Tanner and Smart*, any conditional promise defeats the acknowledgment: so that, however strongly the debt may be admitted, unless there be a promise to pay it, it cannot be enforced. Lord Tenterden said, in *Tanner v. Smart*, "Upon a general acknowledgment, *where nothing is said to prevent it*, a promise to pay may, and ought to be implied; but where the party guards his acknowledgment, and

(z) *Comyn*, 54; *Salk.* 29, S. C.

(a) *Morrell v. Frith*, 3 M. & W. 402; *Bateman v. Pinder*, 3 Q. B. 574, E. C. L. R. vol. 43; *Hurst v. Parker*, 1 B. & Ald. 92; *Cripps v. Davis*, 12 M. & W. 159; *Hart v. Prendergast*, 15 L. J. (Exch.) 223; 14 M. & W. 741, S. C.; *Williams v. Griffith*, 3 Exch. 335.

(b) 5 M. & Sel. 75.

(c) 16 East, 420.

accompanies it with an express declaration to prevent any such implication, why shall not the rule '*Expressum facit cessare tacitum*' prevail?" So rigorously has this been followed, that, in the case of *Hart v. Pendergast*,^(d) the following written statement was held an insufficient "acknowledgment or promise" to satisfy the statute. "I will not fail to meet Mr. H. (the plaintiff) on fair terms, and have now a hope that before, perhaps, a week from this date I shall have it in my power to pay him, at all events, a portion of the debt, when we shall settle about the liquidation of the balance." Pollock, C. B., held, "It is not sufficient that the document contains a promise by the defendant to pay *when he is able, or by bill*, or a mere *expectation* that he shall pay at some future time; it should contain either an unqualified promise to *pay, [*393] that is, a promise to pay *on request*, or if it be a conditional promise, or a promise to pay on the arrival of a certain period, the performance of the condition on the arrival of that period, should be proved by the plaintiff. The only question in the present case is, whether this letter contains a promise to pay the debt on request. Now, certainly, it does not in terms contain such a promise."^(e)

[This doctrine as to conditional ability has been carried further on the authority of *Tanner v. Smart* in the case of *Waters v. Earl of Thanet*,^(f) where the defendant gave an acknowledgment of certain overdue bills of exchange in a memorandum thus worded: "I hereby debar myself of all future plea of the Statute of Limitations in case of my being sued for the recovery

(d) *Supra*.

(e) *Spong v. Wright*, 9 M. & W. 629; *Morrell v. Frith*, *supra*; and *Cripps v. Davis*, 12 M. & W. 159.

(f) 2 Q. B. 757, E. C. L. R. vol. 42.

of the amounts of the said bills and of the interest accruing thereon at the time of my being so sued : and I hereby promise to pay them, separately or conjointly, with the full amount of legal interest on each or both of them, whenever my circumstances shall enable me to do so, and I may be called upon for that purpose." Now in this case the defendant had become able to pay the bills above six years before the action was brought; but the plaintiff was ignorant of it. But it [*394] was decided, that, when a debtor *protected by the statute promises to pay whenever he may be able, the creditor is expected to be on the watch, and when he brings his action must prove the ability which revives his right. The period at which it is revived is that of the fact taking place, *not* of his becoming acquainted with it.

[These decisions have been thought unsupported by the case of *Heyling v. Hastings*, from which that of *Tanner v. Smart* derived its authority, and even at variance with it : the words there used by the debtor were, "Prove it, and I will pay you : " and it was held, that "the promise, *though conditional*, shall bring it back within the statute, *for the defendant waives the benefit of the Act as much as by an express promise ;*" and Holt, C. J., having reserved the point, ten Judges conferred and approved of the judgment; adding, that if the creditor proved the delivery of the goods, which he might do *at the trial*, it would suffice to take the case out of the statute. (g) The law, however, seems settled.

[If the evidence be of a promise to pay on condition, and the condition be performed, it becomes absolute, and is a promise to pay on request. For instance, where the acknowledgment was, "I am in receipt of your letter of the 6th, handed me this morning. I

(g) 1 Ld. Raym. 389, and 421 ; Salk. 29 S. C.

have forwarded to Mrs. J., with a request she will come over without delay to settle the business. May I beg you will write to her by the first post to press payment, and what *she may be short I will assist to make up. I send you her address." This was [*395] held sufficient. (*h*)

[It is not necessary that the sum due should be named; but if there is an unequivocal admission of the debt, and a difference only upon the amount, the operation of the statute is barred. (*i*)

[It has been also held, that an acknowledgment may *primâ facie* satisfy the statute, but that other evidence is admissible to rebut such inference; such, for example, as shows that a document was drawn up with a view to the debt being paid in a particular way. (*j*)

[The promise or acknowledgment must, in all cases, be made before action brought; it is unavailable if made afterwards. (*k*)]

As observed before, the Court of Common Pleas has decided in *Hyde v. Johnson* (*l*) that, there being no mention of an agent, a signature by an agent is not sufficient for the purpose, so that it is curious enough to observe, that under this Act a man's agent cannot bind him by the acknowledgment of a simple contract debt, though he may, under Lord Brougham's Act, by acknowledging a bond debt, which is a contract of so much more importance in the eye of the law.

*The fifth *exception* arises from a clause in Lord Tenterden's Act, which exempts from the [*396]

(*h*) *Humphreys v. Jones*, 14 M. & W. 3, per Parke, B.

(*i*) *Waller v. Lacy*, 1 M. & Gr. 54, E. C. L. R. vol. 39; *Gardner v. M'Mahon*, 3 Q. B. 561, E. C. L. R. vol. 43.

(*j*) *Cripps v. Davis*, 12 M. & W. 159.

(*k*) *Bateman v. Pinder*, 3 Q. B. 574, E. C. L. R. vol. 43.

(*l*) 2 Bing. N. C. 776, E. C. L. R. vol. 29.

operation of that Act the effect of any payment, whether of principal or interest. Now, before Lord Tenterden's Act passed, a part payment, whether of principal or interest, had the effect of taking the debt in respect of which it was paid out of the operation of the statute,^(m) and therefore will have the same effect since.⁽ⁿ⁾ Indeed, from the case of *Whitcomb v. Whiting* just cited, you will see that where there are several joint debtors, payment by one takes the debt out of the operation of the statute *as against the others*.

[There have been many decisions as to what is a sufficient payment to bar the statute, of which some notice is expedient. It is not required that the whole sum due and payable at the time should be paid. In *Bateman v. Pinder*,^(o) *Whitman, J.*, said, "Part payment is an acknowledgment, and an acknowledgment, though not a promise in terms, may amount to one virtually; but where it is not made till after action brought, it cannot prevent the operation of the statute." And this part payment may be made by a bill, as well as by money, for the statute intending to make
[*397] *a distinction between mere acknowledgments by word of mouth, and acknowledgments proved by the act of payment, it cannot be material whether such payment be afterwards avoided by the thing turning out to be worthless. The intention and the act by which it is evinced, remain the same. The word payment must be taken to be used by the Legislature in a popular sense, large enough to include the species of payment by a bill.^(p) Part payment of interest

(m) *Whitcomb v. Whiting*, Dougl. 652.

(n) *Wyatt v. Hodson*, 8 Bing. 309, E. C. L. R. vol. 21; *Channell v. Ditchburn*, 5 M. & W. 494; *Bamfield v. Tupper*, 7 Exch. 27; *Fordham v. Wallis*, 22 L. J. (Chanc.) 548.

(o) 3 Q. B. 574, E. C. L. R. vol. 43.

(p) *Turney v. Dodwell*, 23 L. J. (Q. B.) 137; 3 E. & B. 136, E. C. L. R. vol. 77.

equally suffices.(*q*) Nor is it essential that money or a bill should actually pass; for the statement of a mutual settlement of account between the parties is equivalent to a payment, if the party to whom the debt is owing agree that it shall be paid by the setting off of the same amount, so that the sum set off is evidence of payment, if the party against whom it is set off did not object to it when his account was settled.(*r*) The principle of this is, that the going through an account with items on both sides, and striking a balance, converts a set-off into a payment, and is a transaction out of which a new consideration may be said to arise.(*s*)

[Where a specific sum of money is due, as upon a promissory note, the mere fact of a payment of a smaller sum by the debtor to the creditor is some *evidence of a part payment to take the case [398] out of the Statute of Limitations.(*t*) The object and effect of such payments is rather matter of evidence than of law;(*u*) as where a party on being applied to for interest, paid a sovereign, and said he owed the money, but would not pay it, it was considered to be a question for the jury to say whether he intended to refuse payment, or merely spoke in jest.(*x*) The question will always turn upon the distinction between cross demands and set off on the one hand, and part payment on the other; a distinction clear enough in principle, but dependent for its application on facts, and therefore not always applicable with ease.(*y*)

(*q*) *Dowling v. Ford*, 11 M. & W. 329.

(*r*) *Scholey v. Walton*, 12 M. & W. 510.

(*s*) See also *Ashby v. James*, 11 M. & W. 542.

(*t*) *Burn v. Boulton*, 15 L. J. (C. P.) 97; 2 C. B. 476, S. C.; E. C. L. R. vol. 52. (*u*) *Nash v. Hodgson*, 23 L. J. (Chanc.) 780.

(*x*) *Wainman v. Kynman*, 1 Exch. 118.

(*y*) *Worthington v. Grimsditch*, 15 L. J. (Q. B.) 52; 7 Q. B. 479, S. C., E. C. L. R. vol. 53; *Waugh v. Cope*, 6 M. & W. 824.

[Payment of interest by one of the makers of a joint and several note is sufficient to take the case out of the Statute of Limitations as to the other maker, notwithstanding he joined in the note merely as a surety, and notwithstanding such payment be made more than six years after the note became due. So a payment made by one partner after the dissolution of the partnership, on account of a partnership debt, and after six years have elapsed without any acknowledgment of the debt, has been recently held sufficient to take the [*399] *case out of the statute as against the other partner, though the jury find that the payment was fraudulently made against his consent, and in concert with the creditor to revive the debt.(z)]

On the construction of this part of Lord Tenterden's Act, the case of *Waters v. Tompkins*(a) [contains the following important observations, with which this exception will be amply explained,—“On the perusal of the first clause of Lord Tenterden's Act, it would seem that the proviso takes the case of part payment of principal, or payment of interest, out of the operation of the statute altogether; and therefore that these facts would not only have the same effect, but might be proved exactly in the same way that they would have been if the Act had not passed, and consequently by the defendant's parol admission, which species of proof of a simple fact is not exposed to the same degree of danger as attended the admission of acknowledgment of the debt itself. But the Court of Exchequer, in the case of *Willis v. Newham*,(b) decided that the verbal acknowledgment of part payment of a debt was insufficient; and they construed the Act as containing a general provision, that, in no case, should an

(z) *Goddard v. Ingram*, 3 Q. B. 839, E. C. L. R. vol. 43.

(a) 2 Cr. M. & R. 726.

(b) 3 Y. & J. 518.

acknowledgment or promise by words only be sufficient to take the case out of the Statute of Limitations, whether such acknowledgment were of the existence of the debt, or of the *fact of part payment, and they considered the proviso as [*400] leaving to the fact of part payment if properly proved, that is not by an acknowledgment only, the same effect which it had before the statute. And this construction of the Act certainly extends the remedy and obviates the mischief to be guarded against, in a greater degree than the words taken in their ordinary sense would do. But if part payment or payment of interest is proved in any legal mode, and not by admission only, this case is no authority that such proof is not sufficient. The Act of 9 Geo. 4, as explained by that case, does not prohibit or qualify the ordinary mode of legal proof in any respect, save that it requires something more than mere admission; the meaning of part payment of the principal is not the naked fact of payment of a sum of money, but payment of a smaller on account of a greater sum due from a person making the payment to him to whom it is made; which part payment implies an admission of such greater sum being then due, and a promise to pay it; and the reason why the effect of such a payment is not lessened by the Act is, that it is not a mere acknowledgment by words, but it is coupled with a fact. The same observation applies to the payment of interest. But if the payment of a sum of money is proved as a fact, and not by a mere admission, there is nothing which requires the appropriation to a particular account to be proved by an express declaration of the party *making it at the time, such appropriation may [*401] be shown by any medium of proof, and many instances might be put of full and cogent proof of such

appropriation, where nothing was said at the time by the debtor, as for example, if the day before the debtor had called and informed the creditor that he would, the day after, send his clerk with a specific sum, on account of the larger debt, then described, for which the action was brought, and should require a receipt for it, and the clerk did pay that specific sum and took the creditor's receipt, expressly stating the account on which it was received, and delivered it to his employer, there could be no doubt that such evidence would not only be admissible, but if distinctly proved, at least as satisfactory as a declaration accompanying the act of payment." [After considering attentively the reasoning here quoted, the student will be prepared to hear, that by a recent case it has been decided, that, as regards the evidence of payment, an *admission* of payment suffices, although not in writing, but merely by word of mouth.(c)¹]

The last exception to which I have to advert is that arising out of the exception in the statute of James the First, of accounts between merchant and merchant. It was for a long time thought that the effect of this

(c) *Cleave v. Jones*, 20 L. J. (Exch.) 238; 6 Exch. 573, S. C., in Exch. Ch.

¹ Upon the effect of payment of part, either principal or interest; see *Arnold v. Downing*, 11 Barbour Sup. Ct. 554; *Smith v. Simms*, 9 Georgia, 418; *Evans v. Smith*, 34 Maine, 33; *Jones v. Jones*, 1 Foster, 219; *Whipple v. Stevens*, 2 Ibid. 219; *Sibley v. Phelps*, 6 Cushing, 172; *Bell v. Crawford*, 8 Grattan, 110; *Biscoe v. Stone*, 6 English, 39; *Wood v. Wylds*, Ibid. 754; *Chambers v. Walker*, 4 Richardson, 548; *M'Cullough v. Henderson*, 24 Mississippi, 92; *Anderson v. Robertson*, Ibid. 389.

Where such payment is made by one of several parties jointly liable: *Bogul v. Vermilya*, 10 Barbour Sup. Ct. 32; *Ellicott v. Nicholls*, 7 Gill, 85; *Whipple v. Stevens*, 2 Foster, 219; *Balcom v. Richards*, 6 Cushing, 360; *Reid v. M'Naughton*, 15 Barbour, 168; *Tillinghast v. Nourse*, 14 Georgia, 641.

clause was to take dealings *between merchants [*402] out of the Statutes of Limitation altogether, where there was an account current between them, and to enable a merchant to maintain an action at any time against another merchant in respect of a debt contracted in the course of trade, and forming an item of such an account; and you will find this view learnedly supported in the notes to *Webber v. Tivill*.(d) But the Court of Exchequer has very lately decided that the exception in favor of merchants' accounts can only be taken advantage of in an action of account properly so called, not in an action upon promises. That decision is *Inglis v. Haigh*;(e) and the effect of it was for some time to render the old and almost obsolete action of account of considerable importance. This effect has been subsequently narrowed by the case of *Cottam v. Partridge*,(f) which decided that an open account between two tradesmen for goods sold by each to the other, without any agreement that the goods delivered on the one side shall be considered as payment for those delivered on the other, does not constitute such an account as concerns the trade of merchandise between merchant and merchant, within the exception of the Statute of Limitations. "I think," said Tindal, C. J., "that the exception is not applicable where an action of account cannot be maintained; and I am of *opinion, [*403] that under the circumstances of the present case, an action of account would not lie. [His Lordship read the 3d section of the statute, 21 Jac. 1, c. 16.] The exception, therefore, extends only to such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants, and cannot apply, except where an action of account, or an

(d) 2 Wms. Saund. 124.

(e) 8 M. & W. 769.

(f) 4 M. & Gr. 271, E. C. L. R. vol. 43.

action on the case for not accounting, would lie. Is this a case in which an action of account could be maintained? It is laid down in Selwyn's *Nisi Prius*, p. 1, 8th edit., that by the common law an action of account for the rents and profits may be maintained by the heir, after he has attained the age of fourteen years, against the guardian in socage; so, at the common law, account will lie against a bailiff or receiver, and, in favor of trade and commerce, by one merchant against another. It has not been contended, that an action of account will lie in every case where there have been sales of goods between tradesmen, but only where there are mutual accounts, and an agreement has been come to that the one shall be set off against the other, and the balance alone is claimed by the party in whose favor it is found; for otherwise the case could not be distinguished from the ordinary one of goods sold and delivered with a claim of set-off of a similar description."

[There are a few other rules applicable alike to every species of contract, and which it is convenient *to
[*404] notice in a work treating like this of the general principles of the law of contracts. These are the rules according to which contracts are construed in Courts of justice, and the student will probably find them deserving of much interest when he observes that they are not merely conventional rules of law, but are the canons by which all writings of every description are construed, and by which the meaning and intention of men is ascertained, (g) when that meaning and intention are indicated not by their words or writings only, but by their actions and conduct. It is obviously of the utmost importance that these rules of construction should be applied with consistency, and, indeed, as far

(g) *Doe d. Hiscocks v. Hiscocks*, 5 M. & W. 363; ante, p. 31.

as practicable, with uniformity. In order to secure the attainment of these objects, the construction of all written instruments belongs to the Judges, who may reasonably be expected to apply with uniformity the rules with which they are by study and experience familiar, and not to the jury whose habits of mind and experience are necessarily different and various, and who, in many cases not being familiar with the rules, and in all cases practically unacquainted with their application, cannot reasonably be expected to apply them with uniformity. "The construction of all the written instruments," said the Court of Exchequer in giving judgment in the case of *Nielson v. Harford*,^(h) [*405] "belongs to the Court alone, whose duty it is to construe all such instruments as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury; and it is the duty of the jury to take the construction from the Court, either absolutely, if there be no words to be construed as words of art or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them. Unless this were so, there would be no certainty in the law; for a misconstruction by the Court is the proper subject (by means of a bill of exceptions) of redress in a Court of error; but a misconstruction by the jury cannot be set right at all effectually." A very good example of what is here said by the Court of Exchequer, as well as of the rules of construction which the Judges apply, is furnished in the case of *Simpson v. Margitson*; ⁽ⁱ⁾ where the plaintiff,

(h) 8 M. & W. 823. See *Smith v. Thompson*, 8 C. B. 44, E. C. L. R. vol. 65.

(i) 11 Q. B. 23, E. C. L. R. vol. 63.

an auctioneer, had been employed to sell an estate upon the terms of a letter from the defendant to him, which contained these words, "the terms upon which the sale of the North Cove estates is offered to you are 17. per cent. upon the purchase-money; that to include every expense, and to be paid, if sold by auction [*106] *or within two months after. Half per cent. if not sold by auction, or within two months after, upon a reserved price." The defendant contended, that month in temporal matters meant lunar month; unless either from the context or from the usage in a trade, business, or place, it is made to appear that the parties intended another meaning; and nothing of the sort appearing in that case, that it was the duty of the Judge to have construed the contract and decided against the plaintiff. "If the context," said the Court, "shows that calendar months were intended, the Judge may adopt that construction. (*k*) If the surrounding circumstances at the time when the instrument was made show that the parties intended to use the word not in its primary or strict sense, but in some secondary meaning, the Judge may construe it from such circumstances according to the intention of the parties. (*l*) If there is evidence that the word was used in a sense peculiar to a trade, business, or place, the jury must say whether the parties used it in that peculiar sense. (*m*) If the meaning of a word depends upon the usage of the place where anything under the

(*k*) *Lang v. Gale*, 1 M. & Sel. 111; *Regina v. Chawton*, 1 Q. B. 247, E. C. L. R. vol. 41.

(*l*) *Goldshede v. Swan*, 1 Exch. 154; *Walker v. Hunter*, 2 C. B. 324, E. C. L. R. vol. 52; *Bacon's Maxims*, Reg. 10; *Mallan v. May*, 13 M. & W. 511; *Beckford v. Crutwell*, 1 M. & R. 187, E. C. L. R. vol. 17.

(*m*) *Smith v. Wilson*, 3 B. & Ad. 728, E. C. L. R. vol. 23; *Grant v. Maddox*, 15 M. & W. 737; *Jolly v. Young*, 1 Esp. 186.

instrument is to be done, *evidence of such usage must be left to the jury.⁽ⁿ⁾ Also the jury may have to give the meaning of some technical words. But the present is not within either of the above principles; nor can we find any authority for saying that the conduct of the parties to a written contract is alone admissible evidence to withdraw the construction of a word therein of a settled primary meaning from the Judge and to transfer it to the jury. [*407]

[It would have appeared needless to remark that the same sense is to be put upon the words of a contract in an instrument under seal, as would be put upon the same words in any instrument not under seal, if the question had not actually been raised in argument; for the same intention will be expressed by the same words in a contract in writing, whether with or without seal. Nor can it signify in what Court the instrument is construed; for the question, what is the meaning of the contract, cannot be affected by the question, what is to be the consequence of the contract, or what the remedy for the breach, or by any other matter in which the practice of the Courts may differ. The rule of construction, therefore, must be the same, whether in a civil or a criminal Court, or whether in a Court of law or equity.]

[In the first place, it is the most important of all the rules of construction, that the whole of the *agreement is to be considered. This is so reasonable and clear, that no explanation is required of it; for obviously it cannot be the intention of the parties to an agreement, with stipulations or qualifications, that some of them should be altogether disregarded, and a part of the agreement magnified into an [*408]

(n) *Robertson v. Jackson*, 2 C. B. 412, E. C. L. R. vol. 52; *Bourne v. Gatliff*, 11 Cl. & F. 45. See *Hitchin v. Groom*, 5 C. B. 515, E. C. L. R. vol. 57.

equality with the whole; but on the contrary, such a meaning is to be given to particular parts as will, without violence to the words, be consistent with all the rest, and with the evident object and intention of the contracting parties. The few strong expressions used by Lord Tenterden, in the case of *Doe d. Bywater v. Brandling*,^(o) as to the mode of construing Acts of Parliament, are equally applicable to the mode of construing contracts; and their reasonableness will appear from the mere enunciation of them:—"We are to look not only at the language of the preamble or of any particular clause, but at the language of the whole Act; and if we find in the preamble or in any particular clause, an expression not so large and extensive in its import as those used in other parts of the Act, and upon a view of the whole Act we can collect from the more large and extensive expressions used in other parts the real intention of the Legislature, it is our duty to give effect to the larger expressions, notwithstanding the phrases of less extensive import in the preamble or in any particular clause."

[*409] In like *manner general words may be restrained by the recital, where it is evident from the whole agreement that they were intended to apply to the matter recited. Thus, a deed recited that disputes were subsisting between Simons and Johnson, about which actions at law had been brought, and that it had been agreed, in order to put an end thereto, that each of them should execute a release of all actions and causes of action, claims, and demands which each of them had or might claim by reason of anything whatsoever. "I cannot read this," said Lord Tenterden, "without seeing that the release which follows was intended to apply to the matter recited, namely, the actions then depending, and that

the object was to put an end to them. The generality of the language was therefore to be confined by the recital.”(p)

[An important instance of this rule is, that where general words follow others of more particular meaning, they are to be construed as applicable to things *ejusdem generis* with the former particular words.(q) Thus, an action was brought upon a policy of insurance in the ordinary form, wherein the perils which the insurers were to bear are stated to be “of the sea, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of *mart and countermart, [*410] surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes and people, of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment and damage of the said goods and merchandise, and ship, &c., or any part thereof.” The facts of the case were, that the ship and goods had been sunk at sea by another, and friendly, vessel firing upon her, mistaking her for an enemy; and the question was, whether the injury was within the general words with which the perils enumerated were concluded. The Court decided that the assured was entitled to recover, as the loss was of the same kind as the perils expressly mentioned, and was, therefore, within the general terms. The Court of Queen’s Bench, whose judgment was delivered by Lord Ellenborough, considered, in opposition to an argument on the part of the plaintiff, that it was a loss by perils of the

(p) *Simons v. Johnson*, 3 B. & Ad. 175, E. C. L. R. vol. 23; *Payler v. Homersham*, 4 M. & Sel. 423.

(q) *Cullen v. Butler*, 5 M. & Sel. 461; *Naylor v. Palmer*, 22 L. J. (Exch.) 329; 8 Exch. 739, S. C.; *Jones v. Nicholson*, 23 L. J. (Exch.) 330; 10 Exch. 28, S. C.

sea, merely because it happened there, that all the other causes of loss specified in the policy were upon that ground equally entitled so to be considered, and it would be unnecessary ever to assign any other cause of loss than a loss *by* perils of the sea; but the Court continued, as that has not been the understanding and practice on the subject hereto, and inasmuch as the very insertion of the general or sweeping words, as they are called, in the policy after the special words [*411] *imports that the special words were not understood to include all perils happening on the sea, but that some more general words were required to be added in order to extend the responsibility of the underwriters unequivocally to other risks not included within the proper scope of any of these enumerated perils, "I shall think it necessary," said Lord Ellenborough, "only to advert shortly to some of the reasons upon which we think that the general words thus inserted comprehend a loss of this nature. The extent and meaning of the general words have not yet been the immediate subject of any judicial construction in our Courts of law. As they must, however, be considered as introduced into the policy in furtherance of the objects of marine insurance, and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words, they are entitled to be considered as material and operative words, and to have the due effect assigned to them in the construction of this instrument; which will be done by allowing them to comprehend and cover other cases of marine damage of the like kind with those which are specially enumerated and occasioned by similar cases."

[Another very clear example(*r*) of the same rule is

(*r*) *Nesbitt v. Lushington*, 4 T. R. 783; *Glaholm v. Hays*, 2 M. & Gr. 257, E. C. L. R. vol. 40.

afforded by a case where a ship, loaded with corn, being forced by stress of weather into Elly *harbor, in Ireland, and there happening to be a [*412] great scarcity of corn there at the time, the people came on board the ship in a tumultuous manner, took the government of her, and suffered her to drive on rocks, where she was stranded. The question was, whether she was detained by people as in the policy above mentioned. "The word people," said Mr. Justice Buller, "in the policy means the supreme power, the power of the country, whatever it may be. This appears clear from another part of the policy; for when the underwriters insure against the wrongful acts of individuals, they describe them by the names of pirates, rogues, thieves; then, having stated all the individual persons against whose acts they engage, they mention other risks, those occasioned by the acts of kings, princes, and people of what nation, condition, or quality soever. These words, therefore, must apply to nations in their collective capacity."

[It is obvious, that, if the whole of the agreement is to be considered, the place where it was made, the time when, the object of the parties, and the department of science or art, trade or commerce, to which the subject-matter of it belongs, must be regarded; for, otherwise, the meaning of words which have peculiar acceptations at different times and places, and in relation to different subject-matters, cannot be accurately understood. But bearing in mind these observations as to the *peculiar meaning which words [*413] sometimes bear, and to the context of the whole contract, the usual and proper modes of understanding words is according to their ordinary sense and meaning. Of this mode, the case of *Barton v. Fitzgerald*(s)

is a strong instance. In this case, the defendant by deed, reciting a lease which by several assignments had come to him, and that the plaintiff had contracted for the absolute purchase of the premises, assigned them to the plaintiff for the residue of the term in as ample a manner as he held the same, and covenanted that it was a good and subsisting lease, valid in law, and not forfeited or otherwise determined or become void or voidable; the fault was, that the original lease was for ten years determinable on a life which fell before the ten years expired, but after this assignment to the plaintiff. And the Court held, that the plain and absolute terms of the covenant must have their full meaning, and that consequently it had been broken by the defendant; although there was another covenant against incumbrances confined to such as were created by the defendant, and those who might claim under him, and a covenant for quiet enjoyment restrained in the same manner.^(t) Another instructive instance of the rule of giving to each word its ordinary and popular meaning as evidently affected by the context or circumstances *before mentioned, is furnished [*414] by the case of *Lord Dormer v. Knight*,^(u) in which a deed had been executed by the defendant, granting an annuity for the use of his wife; provided, that, if she should associate, continue to keep company with, or cohabit, or criminally correspond with a person named, the annuity should cease. It was held, that all intercourse, however innocent, was prohibited. "The words of the deed," said the Court, "are as general as can be, and go much further than the exclusion of criminal cohabitation. The intention was to put a stop to all intercourse whatever between these two

(t) See *Worthington v. Warrington*, 5 C. B. 635, E. C. L. R. vol. 57.

(u) 1 Taunt. 417.

persons. The receiving a person's visits whenever he chooses to call, is associating with him. The parties have chosen to express themselves in these terms, and the words must receive their common meaning and acceptation." In like manner where a warrant of attorney had been given to the plaintiff by the defendant, but it was agreed not to enter up judgment upon it, unless the defendant should dispose of his business, or become bankrupt or insolvent, it was held, that the latter words meant a general inability to pay his debts, and not merely his having recourse to the protection of the Insolvent Courts.(x)

[But a very little consideration will show that the *rule of understanding the words and sentences [*415] in their ordinary meaning, when it is not restrained by the context, is perfectly consistent with the rule that the whole context is to be considered; which is, indeed, the just rule of interpretation, and is very conveniently couched in the ancient maxim of the law, *Ex antecedentibus et consequentibus fit optima interpretatio.*(y)]

[These are the principal rules for the construction of contracts. There are others, less general, which are sometimes referred to. They will be found very clearly treated of in Broom's Maxims, 2d edition; and both these, and the more general rules which it has been attempted to illustrate in this volume, are explained at large in Sheppard's Touchstone; in which book, indeed, many of the topics treated of in these Lectures will be found explained in the most scientific and masterly manner.]

(x) Biddlecombe v. Bond, 4 Ad. & E. 332, E. C. L. R. vol. 31.

(y) 1 Shep. Touch. 87; Coles v. Hulme, 8 B. & C. 568, E. C. L. R. vol. 15.



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